

No. 89-1796 ⁽²⁾

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IN THE
Supreme Court of the United States

October Term, 1989

**JOHN HASSO, ELISSA N.V., RUMBA, N.V.,
PACIFIC MIDLAND N.V., KONDOLAND CORP. AND
GRAPE CAPITOL CORP.,**

Petitioners,

v.

CHARLES A. DUGGAN,

Respondent.

**ON PETITION FOR A WRIT
OF CERTIORARI TO THE STATE
OF CALIFORNIA COURT OF APPEAL
FOR THE FIRST APPELLATE DISTRICT,
DIVISION FOUR**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the ordinary evidentiary rulings by the Trial Judge raise Federal Questions invoking this Court's jurisdiction, since Hasso asks this Court to weigh evidence on the reprehensibility of his fraudulent conduct, an issue of fact in the case.

2. Whether Hasso has failed to preserve and therefore has waived a Federal Due Process challenge to evidentiary rulings of the Trial Judge, since he did not press a federal due process challenge in the courts below and therefore the Court of Appeal did not pass on his challenge.

3. Regarding the exclusion of four pieces of so-called mitigating evidence, whether the application of (i) *Res Judicata* (California Code of Civil Procedure § 1908(a)), (ii) the California Rule of Evidence prohibiting admission of irrelevant evidence (Evidence Code § 350) and (iii) the California Rule of Evidence empowering a trial judge to exclude prejudicial evidence having only slight probative value (Evidence Code § 352) constitutes an independent and adequate state ground for the Judgment, thereby making review of this case on Federal due process grounds inappropriate.

4. Regarding the admission of so-called litigation conduct evidence, whether (i) Petitioner's failure to object in the trial court and thereby preserve his right to claim error under California law and (ii) the relevance and admissibility of the evidence on issues separate from the issue of reprehensibility constitute independent and adequate state grounds for the judgment, thereby making review of this case on Federal due process grounds inappropriate.

5. Whether this Court's recent decision in *Browning-Ferris* declining to craft common-law standards of excessiveness that rely on notions of proportionality makes it inappropriate to accept Hasso's invitation to do that very thing in this state case, in derogation of the distinction between state law and federal law issues.

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| LIST OF APPENDICES | iv |
| TABLE OF AUTHORITIES | vi |
| OPPOSITION TO PETITION | 1 |
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 4 |
| A. Deposit To Stay Execution | 7 |
| B. Disposition Of Hasso's Assets Between 1982 Trial And 1988 Trial | 7 |
| C. 1988 Retrial To Calculate Damages | 8 |
| D. Calculation of Profit | 10 |
| E. Net Worth Of Hasso And His Corporations | 10 |
| F. Judge Champlin's View Of Hasso's Conduct | 10 |
| REASONS FOR DENYING THE WRIT | 12 |
| I. THIS PETITION INVOLVES ONLY ORDINARY EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND CANNOT RAISE A CONSTITUTIONAL CHALLENGE EITHER TO THE CALIFORNIA STATUTE ESTABLISHING THE GROUNDS OF LIABILITY FOR PUNITIVE DAMAGES OR TO CALIFORNIA COMMON LAW STANDARDS FOR CALCULATING THE AMOUNT OF PUNITIVE DAMAGES | 12 |
| II. HASSO FAILED TO RAISE AND PRESERVE FEDERAL DUE PROCESS OBJECTIONS TO THE EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND THEREFORE WAIVED THEM AND THE COURT OF APPEAL DID NOT PASS ON HIS DUE PROCESS CLAIMS | 15 |
| III. JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN EXCLUDING FOUR PIECES OF DISCRETE EVIDENCE | 19 |

| | |
|--|----|
| IV. JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN ADMITTING EVIDENCE OF HASO'S PATTERN OF FRAUDULENT CONDUCT AFTER THE 1982 TRIAL IN TRANSFERRING AND LYING ABOUT HIS ASSETS SO AS TO AVOID COLLECTION EFFORTS FOR COMPENSATORY DAMAGES AND LIABILITY FOR PUNITIVE DAMAGES..... | 21 |
| V. THE COURT'S DECISION IN <i>BROWNING-FERRIS</i> FORECLOSES HASO'S ARGUMENT THAT THIS COURT SHOULD ESTABLISH PROPORTIONALITY STANDARDS TO APPLY TO PUNITIVE DAMAGE AWARDS IN FEDERAL AND STATE COURTS IN ALL FIFTY STATES..... | 22 |
| VI. IT WOULD BE A MISCARRIAGE OF JUSTICE FOR THIS COURT TO GRANT HASO'S PETITION AND TO REVERSE THE TWO MILLION DOLLARS PUNITIVE DAMAGE JUDGMENT IN VIEW OF THE FACT OF HASO'S PERJURY AT TRIAL AND THE FACT THAT HE IS ONLY REQUIRED TO DISGORGE A PORTION OF THE PROFITS HE GAINED BY HIS FRAUDULENT CONDUCT | 24 |
| CONCLUSION | 28 |

LIST OF APPENDICES¹

| | <u>Page</u> |
|---|-------------|
| APPENDIX G | |
| EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S DECISION TO USE PETITIONER'S PROPOSED 14.71 JURY INSTRUCTION [RT 2203:4—2204:1].... | G1 |
| APPENDIX H | |
| BAJI 14.71 HASSO JURY INSTRUCTION NO. 25 [CT 1053] | H1 |
| APPENDIX I | |
| STATEMENT READ TO THE JURY [RT 823:20—829:28]..... | I1 |
| APPENDIX J | |
| DEFENDANTS' PROPOSED PROCEDURAL AND FACTUAL STATEMENT TO BE READ INTO THE RECORD [CT 833—855] | J1 |
| APPENDIX K | |
| PETITION FOR REVIEW, CALIFORNIA SU- PREME COURT, DATED JANUARY 9, 1990. | K1 |
| APPENDIX L | |
| CHART, THE PROFIT ON PROFIT FROM THE FRAUD | L1 |
| APPENDIX M | |
| TRIAL EXHIBIT 1, DECLARATION OF JOHN HASSO IN SUPPORT OF MOTION FOR STAY OF EXECUTION, NAPA COUNTY SUPERI- OR COURT, DATED SEPTEMBER 2, 1982..... | M1 |
| APPENDIX N | |
| TRIAL EXHIBIT 2, EXCERPT FROM ORDER AND FINDINGS OF FACT OF UNITED STATES BANKRUPTCY COURT JUDGE, CONLEY S. BROWN, DATED JANUARY 13, 1983 | N1 |

¹ For the Court's convenience and ease of reference, Respondent's Appendices attached to this Opposition Brief begin at "APPENDIX G" as an extension of the appendices lettering sequence used by Petitioner.

APPENDIX O

**EXCERPT FROM OFFICIAL REPORTER'S
TRANSCRIPT, TRIAL JUDGE'S COMMENTS
AS TO THE HASSO FAMILY "CONSPIRACY"
[RT 1357:19—1361:10] O1**

APPENDIX P

**EXCERPT FROM OFFICIAL REPORTER'S
TRANSCRIPT, TRIAL JUDGE'S RULING
THAT BOTH PARTIES ARE PRECLUDED
FROM INTRODUCING EVIDENCE ON THE
BASIC FRAUD [RT 987:17—988:27] P1**

APPENDIX Q

**EXCERPT FROM OFFICIAL REPORTER'S
TRANSCRIPT, REFUSAL OF TRIAL JUDGE
TO RULE *IN LIMINE* ON ADMISSIBILITY OF
SO-CALLED MITIGATING EVIDENCE [RT
855:21—856:21] Q1**

APPENDIX R

**SIGNATURE PAGE, COURT OF APPEAL
OPINION R1**

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE(S)</u> |
|---|----------------|
| <i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 48 U.S. 537, 550 (1987) | 16 |
| <i>Browning-Ferris Industries v. Kelco Disposal, Inc.</i> — U.S. —, 109 S.Ct. 2909 (1989) | 3, 18, 23 |
| <i>Douglas v. Alabama</i> , 380 U.S. 415 (1965) | 18 |
| <i>Hale v. Morgan</i> (1978) 22 Cal.3d 388 | 6 |
| <i>Jenner v. City Council</i> (1958) 164 Cal.App.2d 409 | 6 |
| <i>Lindsey v. Meyer</i> (1981) 125 C.A.3d 536 | 13 |
| <i>Moore v. American United Life Ins. Co.</i> (1984) 150 Cal.App.3d 610 | 21 |
| <i>Neal v. Farmers Ins. Exchange</i> (1978) 21 Cal.3d 910 | 5, 13, 23, 24 |
| <i>Nelson v. Gaunt</i> (1981) 125 Cal.App.3d 623 | 15 |
| <i>Pacific Mutual Life Ins. Co. v. Haslip</i> (Ala. 1989) 553 So.2d 537, cert. granted, 110 S. Ct. 1780 (April 2, 1990) | 26, 27 |
| <i>People v. Babbitt</i> (1988) 45 Cal.3d 660 | 20 |
| <i>People v. Hall</i> (1986) 41 Cal.3d 826 | 20 |
| <i>People v. Taylor</i> (1974) 12 Cal.3d 686 | 9 |
| <i>Taylor v. Illinois</i> , 484 U.S. 400 (1988) | 18 |
| <i>Webb v. Webb</i> , 451 U.S. 493 (1981) | 17 |
| <i>Weiner v. Mitchell, Silberberg & Knupp</i> (1980) 114 Cal. App. 3d 39 | 9 |
| <i>Weirum v. RKO General, Inc.</i> (1975) 15 Cal.3d 40 | 14 |
| <i>Wyatt v. Union Mortgage Co.</i> (1979) 24 Cal.3d 733 | 10, 21 |
| <u>UNITED STATES CONSTITUTION</u> | |
| <i>The Fourteenth Amendment</i> | 5, 17-18 |
| <u>CALIFORNIA STATE CONSTITUTION</u> | |
| <i>Article 1, § 7</i> | 5, 6 |
| <i>Article 1, § 15</i> | 5, 6 |
| <i>Article 6, § 13</i> | 3 |
| <i>Article 6, §§ 11-12</i> | 3 |

| | <u>PAGE(S)</u> |
|---|----------------|
| <u>STATUTES</u> | |
| California Civil Code § 1908(a)..... | 8 |
| California Civil Code § 3294..... | 12, 13, 27 |
| California Civil Code § 3295(a)(1) | 10 |
| California Code of Civil Procedure § 2030 | 22 |
| California Code of Civil Procedure §§ 901-936.1 | 3 |
| California Evidence Code § 210 | 9 |
| California Evidence Code § 352 | 12, 19, 20 |
| California Evidence Code § 353 | 12, 22 |
| California Government Code § 68601(b)..... | 27 |
| <u>COURT RULES</u> | |
| California Rule of Court 29(b)(1)..... | 6 |
| United States Supreme Court Rule 10.1(c) | 2 |
| United States Supreme Court Rule 14.1(a)..... | 2 |
| United States Supreme Court Rule 14.1(f)..... | 3 |
| United States Supreme Court Rule 14.1(h)..... | 2, 3, 17 |
| United States Supreme Court Rule 14.5 | 3 |
| United States Supreme Court Rule 29.4(c) | 3, 13 |
| <u>FEDERAL RULES OF EVIDENCE</u> | |
| Rule 403..... | 20 |

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RESPONDENT'S BRIEF IN OPPOSITION

OPPOSITION TO PETITION

Respondent Charles Duggan respectfully asks this Court to deny John Hasso's Petition for Writ of Certiorari to review the final judgment of the California Court of Appeal, First Appellate District, Division Four.

JURISDICTION

None of the federal due process questions now described by Hasso were properly pressed or passed upon in the California courts. Furthermore, Hasso did not comply with the

mandate of Rule 14.1(h), United States Supreme Court Rules. He failed both to "specify" the "way in which the [federal questions] were passed upon" by the Napa Superior Court and the California Court of Appeal and to make "specific reference to the places in the record . . ." where each federal question was raised, "as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

Respondent Duggan objects to the preamble to the Questions Presented in the Petition on the ground it violates Rule 14.1(a) which mandates that "no other information" shall appear on the Questions Presented page.

Hasso relies on Rule 10.1(c) to establish the discretionary jurisdiction of this Court to grant his petition. Duggan asserts that the ordinary evidentiary rulings of the trial judge do not constitute either (i) "an important question of federal law" which should be settled by this Court or (ii) a federal question that conflicts with applicable decisions of this Court.

Respondent objects to Question Presented No. 1 on the ground that it characterizes as "mitigating" certain evidence excluded in the 1988 trial. This is misleading, since the four discrete pieces of evidence referred to by Hasso were found by the jury in the 1982 liability trial and by the trial judge and by the Court of Appeal in the 1988 trial *not* to mitigate Hasso's fraudulent conduct.

Respondent objects to Question Presented No. 2 on the ground that there is no evidence and no rational basis in the record for concluding that the jury award of punitive damages was based upon Hasso's exercise of "constitutional and statutory rights of appeal . . . and for taking legal steps to prevent execution on the judgment pending the appeal." Duggan told the jury in Opening Statement that Hasso had an "absolute" right to appeal and to stay execution by posting a bond or deposit. (See App. B to Pet., p. B22) The record is clear that the jury awarded punitive damages based upon Hasso's original intentional fraud on Respondent Duggan and Hasso's "pattern of fraudulent conduct since the first trial by transfer-

ring and lying about his assets so as to avoid liability.” (App. B to Pet., p. B30)

Respondent objects to Question Presented No. 3 on two separate grounds. First, the question of whether a punitive damage award is “excessive” or “disproportionate” based upon an application of state legal standards to the unique facts of a state court case was declared to be outside the jurisdiction of this Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989) at p. 2922. Second, petitioner makes an obscure reference to “available post-trial and appellate review” procedures in California, apparently intending to challenge the procedural safeguards afforded by the extensive and time-tested statutory scheme in California both for new trial motions and for appeal.² After more than 12 years of litigation, this is the very first time Hasso has even insinuated that he challenges these extensive statutory provisions. There was no notification to the Attorney General of California as required by Rule 29.4(c). There was no specification to the record of where challenges to these statutes were raised below, as required by Rule 14.1(h). In addition, Hasso has failed to comply with Rule 14.1(f) by setting out “verbatim” the California “constitutional provisions . . . [and] statutes . . . involved in the case. . . .”

Finally, Respondent Duggan objects to the Petition on the ground that Hasso may not invoke the jurisdiction of this Court in view of his failure to comply with Rule 14.5. Hasso failed to present “with accuracy . . . and clearness” the materials and argument “essential to a ready and adequate understanding of the points. . . .” in the following particulars. First, in Question Presented No. 1, Hasso urges this Court to define what evidence *must* be admitted in every punitive damage case in all fifty states, without explaining how this is even possible when each state court case turns on its own unique facts and without proposing rational guidelines which are well-grounded in the policies of federal-state comity. Second, in Question Presented No. 2, Hasso urges this Court

² See, e.g., California Constitution, Article 6, §§ 11-12, 13; California Code of Civil Procedure §§ 901-936.1.

to define what evidence *must* be excluded from a jury assessing punitive damages, without explaining *how* this is possible when each state court case turns on its own unique facts and without proposing rational guidelines which comport with the policies underlying federal-state comity concerns. Finally, Petitioner's principal arguments set forth in the text of the Petition at pp. 12-21 fail to address the threshold and pivotal question of whether the so-called mitigating evidence was even relevant in the first place, and if so whether the probative value of such evidence was slight and substantially outweighed by the prejudicial effect of its admission.

STATEMENT OF THE CASE

This case turned on its own unique facts.

In this case a unanimous 12-member jury in Napa Superior Court, Napa, California, found that petitioner John Hasso committed intentional fraud. The nature of the fraud was a knowingly false promise by Hasso to share profits in a common real estate business venture with respondent Charles Duggan involving eight properties principally located in the Napa Valley Wine Country. The false promise occurred in the spring of 1977.

This case has been tried twice with The Honorable Philip A. Champlin presiding as trial judge at both trials. The complaint was filed on December 21, 1978. The first trial commenced in the spring of 1982. A unanimous jury found that Hasso committed intentional fraud and awarded Duggan compensatory damages in the amount of \$541,359 and punitive damages in the sum of \$1,101,549.75. Hasso made a Motion for New Trial which was denied. Hasso appealed.

The appeal was decided on September 29, 1986. The Opinion and Judgment of the California Court of Appeal affirmed the judgment as to liability for compensatory and punitive fraud damages but reversed for recalculation of the amount of damages. The second trial to calculate damages commenced in the spring of 1988. By general verdict, a

unanimous jury awarded Duggan compensatory damages in the sum of \$483,584 and by special verdict assessed punitive damages against Hasso and his corporations in the sum of \$3 million. Hasso did not request that the jury make any special findings of fact. John Hasso made a Motion for New Trial, asserting three grounds. Two of the grounds related to claims that certain so-called mitigating evidence had been improperly excluded by Judge Champlin and other evidence had been improperly admitted on the issue of his reprehensibility. On these grounds the Motion for New Trial was denied.

The third ground of the Motion was that the punitive damages were excessive as a matter of law, based upon the three standards employed in California for awarding the amount of and measuring the propriety of punitive damages. Those standards are described in *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910 and include (i) the reprehensibility of defendant's conduct, (ii) the amount necessary to punish and deter the defendant in light of his wealth, and (iii) a requirement that the relationship between compensatory damages and punitive damages be reasonable. Judge Champlin made a conditional order granting the new trial unless Duggan agreed to a remittitur of the punitive damages from \$3 million to \$2 million. Duggan agreed to the remittitur. Hasso appealed the \$2 million punitive damage award. After the 1988 trial Duggan's motion in the trial court was granted for disbursement of compensatory damages, and those damages were paid in the summer of 1988, 11 years after the fraud.

On Hasso's appeal, the Court of Appeal affirmed the judgment for punitive damages. The Opinion³ of the Court of Appeal is unpublished and will not be used as legal precedent. In Hasso's Appellant's Opening Brief, he made no reference to "due process" or to the "Fourteenth Amendment" or to the "U. S. Constitution." He made no reference to the due process clause in the California Constitution at

³ Attached as Appendix R is a copy of the signature page of the Opinion, omitted in Appendix B to the Petition. Justice Perley wrote the opinion for a unanimous Court, joined by Justices Anderson (P.J.) and Channell.

Article 1, §§ 7, 15. He never gave the Court of Appeal an opportunity to pass on his claims under the California due process clause. After briefing and oral argument were concluded, the matter was deemed submitted. The Court of Appeal rendered its appellate Opinion and Judgment on November 30, 1989.

John Hasso filed a Petition for Rehearing in the Court of Appeal. For the first time, John Hasso asserted that his federal "due process" rights had been violated. The Petition for Rehearing was denied without comment. (App. C to Pet.) Hasso then filed a Petition for Review in the California Supreme Court, based exclusively on the claim that his federal due process rights had been violated by the evidentiary rulings of the trial judge. A full copy of Hasso's Petition for Review in the California Supreme Court is attached as Appendix K. In that Petition for Review, Hasso acknowledged that he had not raised any "due process" argument or claims until his Petition for Rehearing in the Court of Appeal (App. K, p. K7). The claims of due process violation described and asserted in Hasso's Petition for Review in the California Supreme Court are the same claims now asserted in the Petition in this Court. The Petition for Review was denied *en banc* by a unanimous California Supreme Court. At least one reason why the California Supreme Court rejected John Hasso's federal due process claims was Hasso's failure to raise those claims in his appeal before the Court of Appeal.⁴ See California Rule of Court 29(b)(1) which states the policy of the California Supreme Court not to review issues that could have been but were not timely raised in the Court of Appeal. This case is now in its twelfth year.

⁴ The Court held in *Jenner v. City Council* (1958) 164 Cal.App.2d 409 at p. 498 that constitutional objections are waived unless raised at the earliest opportunity. In his Petition for Review, Hasso asserted that the California Supreme Court created an exception to the *Jenner* rule in the case of *Hale v. Morgan* (1978) 22 Cal.3d 388 which applied to this case. (See App. K, p. K7.) The California Supreme Court rejected Hasso's argument that the *Jenner* rule did not apply to this case. One of several noteworthy distinctions in the *Hale* case is that the appellant did in fact raise his constitutional challenge in the Court of Appeal in a timely and proper manner, in contrast to Hasso's failure to do so in this case.

A. Deposit To Stay Execution

Hasso procured his mother-in-law, Augusta Maidani, to deposit \$2.5 million into the Napa Superior Court to stay enforcement of the judgment. (CT 111) Augusta Maidani represented that the \$2.5 million was her money. On retrial in 1988, John Hasso under oath said that the \$2.5 million was his money. (RT 1125:2-5) In 1987 Augusta Maidani made a motion to withdraw the \$2.5 million deposit. That motion was denied by Judge Champlin. John Hasso's attorney filed a Petition for Writ of Mandate, asking the Court of Appeal to order the Napa Superior Court to release the \$2.5 million deposit. That petition was denied.

At the 1988 trial, Judge Champlin remarked that Augusta Maidani had perpetrated a fraud on the Napa Superior Court in connection with the \$2.5 million deposit and that John Hasso must have been a party to that fraud. (See App. O) Hasso testified that it was "correct" that he attempted to withdraw the \$2.5 million Deposit in 1987 for the purpose of defeating "plaintiff's claim." (RT 1228BC:28-1228BD:6)

B. Disposition Of Hasso's Assets Between 1982 Trial And 1988 Trial.

As noted by the Court of Appeal, there was substantial evidence at the 1982 trial that John Hasso's wealth exceeded \$10 million. (App. B to Pet., p. B3)

Hasso testified at the 1988 Trial that he had transferred essentially all of the "liquid" and "valuable" community property assets to his first wife Hebe Hasso during the time period between the 1982 Trial and the 1988 retrial. (RT 1228AX:11-26)

When Hasso married his second wife Ruth Hasso on or about July 2, 1987, he transferred to her what were essentially the "valuable" and "liquid" properties that he had left in the United States. These three properties were worth \$1 million (RT 1095:12-28).

At deposition just before the 1988 Trial, Hasso testified that his net worth consisted only of approximately \$50,000

in cash and some notes, not including the Iran assets and assets disputed with his first wife Hebe Hasso (RT 1228AO:24-1228AP:9).

Judge Champlin concluded there was a Hasso family "conspiracy" in connection with the diversion and concealment of assets. (See App. B to Pet., p. B8, and Appendix O.)

C. 1988 Retrial To Calculate Damages

Fraud liability for both compensatory and punitive damages had been established by the Opinion and Judgment of the Court of Appeal after the first trial. That became the Law of the Case. The issues on retrial in calendar year 1988 included a calculation of compensatory damages based upon the profit from the sale of the eight properties. On the calculation of punitive damages, the issues included (a) the reprehensibility of Hasso's conduct, (b) the amount of punitive damages necessary to punish and deter in light of his wealth as of trial in 1988, and (c) his credibility.

At the beginning of the trial, there was considerable *in limine* argument with regard to the scope of the evidence. Judge Champlin concluded that on the issue of fraud liability, the parties would not be permitted to relitigate issues of fact which had been conclusively determined at the first trial and fell within the doctrine of Res Judicata, as codified in California Civil Code § 1908(a).⁵ (See Appendix P) In order to apprise the second jury of the facts and transactions relating to the basic fraud, the Court read a comprehensive Statement of Facts to the second jury, at the beginning of the trial (reproduced as Appendix I).

The Statement Of Facts was proposed by Hasso himself, adopted in large part by the Trial Court, and derived from the Court of Appeal Opinion. Prior to trial, John Gulick as Defense Counsel for Hasso submitted a pleading called Defendant's Proposed Factual Statement To Be Read Into

⁵ One of Judge Champlin's many concerns was that Hasso might attempt to relitigate the issue of liability by putting in evidence and arguing that "it was just a little fraud" or "just a mistake" or "no fraud at all." (See App. B to Pet., p. B16)

The Record (CT 883-893) (reproduced as Appendix J). In that document, Hasso's attorney states:

"Thus, to avoid error and to be fair to the parties, Defendant submit that the Court of Appeal decision and recitation of the facts in the opinion should be adopted by the Trial Court as a error proof statement of what the record shows with respect to factual determinations. To permit the parties to argue the findings of other facts would be contrary to the doctrine of collateral estoppel." (Emphasis added) (CT 883-884)

Accordingly, Hasso himself proposed that the Statement of Facts be read to the jury as a matter of fairness to the parties and to avoid violation of the doctrine of *Res Judicata*⁶ (collateral estoppel). Hasso is not permitted to urge the adoption of a procedure in the trial court, only to claim later on that the procedure constituted prejudicial error and violated his federal due process rights. See *Weiner v. Mitchell Silberberg & Knupp* (1980) 114 Cal.App.3d 39.

Hasso argued that there were four pieces of so-called "mitigating" evidence relating to the original fraud which should be placed before the jury. Both the trial court (See App. P) and the Court of Appeal determined that this so-called mitigating evidence was not relevant because it did not have "any bearing on Hasso's false promise" to share profits with Duggan. (App. B to Pet., p. B17) (See Appendix Q) California Evidence Code § 210 defines "relevant evidence" as evidence "having any tendency in reason to prove or disprove any disputed fact. . . ." Judge Champlin and the Court of Appeal concluded that Hasso's so-called "mitigating" evidence did not have any tendency in reason "to disprove" or "to mitigate" the reprehensibility of his fraudulent conduct.

⁶ The California Supreme Court states the purposes of *Res Judicata* in *People v. Taylor* (1974) 12 Cal.3d 686 at p. 695: "We deem the purposes of an application of the doctrine [*Res Judicata*] to be: (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harrassed by vexatious litigation."

D. Calculation of Profit⁷

There was no dispute at the 1988 trial that all eight properties had been sold. Nor was there any dispute as to the gross sales price for each of the properties or that the profit was \$3,367,284 (rounded to \$3.3 million).

E. Net Worth Of Hasso And His Corporations

Plaintiff urged at trial that Hasso's net worth was over \$20 million. Judge Champlin as trial judge found in ruling on the Motion for New Trial that Hasso's net worth is "probably less than \$20 million." (App. A to Pet., p. A7)

Both the trial judge in ruling on the Motion for New Trial (App. A to Pet., p. A7) and the Court of Appeal in affirming the punitive damage judgment (App. B to Pet., p. B3) stated that John Hasso's wealth as of the 1982 trial, six years earlier, was "in excess of \$10 million." If the time value of money is to be considered, carrying \$10 million forward from the 1982 trial to the 1988 trial at 10% annual compounded interest increases the \$10 million to an amount in excess of \$17 million. The Court of Appeal stated that Hasso's wealth was \$12.2 million as of the 1988 trial (App. B to Pet., p. B32).

Judge Champlin stated in his ruling on the Motion for New Trial:

"The defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth." (App. A to Pet., p. A6)

F. Judge Champlin's View Of Hasso's Conduct⁸

Contrary to Hasso's misleading impression, Judge Champlin thought the evidence of Hasso's fraud and his misconduct

⁷ In California the amount of profit gained by the wrongdoer from his fraudulent conduct is highly relevant to a calculation of the amount of punitive damages necessary to punish and deter. See California Civil Code § 3295 (a) (1) and *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 733, 791.

⁸ Hasso asserts (Petition, p. 6) that Justice Poche in his dissent on the appeal from the 1982 trial concluded that there was "scant evidence" of Hasso's intention to defraud Duggan. That is a gross and misleading misrepresentation of Justice Poche's remark. Justice Poche said there was scant evidence of Hasso's intention to seek out unlicensed business partners. There is a considerable difference. Justice Poche's predominant concern in his dissent related to licensure issues which are not implicated in Hasso's Petition before this Court. In any event, the majority of the Court affirmed the judgment as to Hasso's liability and that judgment became final over three years ago in 1986.

was compelling, not “thin.”⁹ In his ruling on the Motion for New Trial, Judge Champlin made it clear that his remarks during the 1982 trial regarding “thin” evidence of fraud were made “in an effort to encourage the parties to settle” and in any event were made “prior to completion of the case and argument of counsel.” (App. A to Pet., p. A4) The Court went on to state that it concluded there was “substantial evidence” upon which the jury based its finding of fraud and that the Court of Appeal agreed.

The Trial Court felt it appropriate and necessary to comment on the “totality of the facts and the circumstances in this case including the original fraud, and the defendant’s compounding conduct during the last several years, *all of which have been an affront to the court system and this community’s sense of fair business practices.*” (Emphasis added) (CT 1405) (App. A to Pet., p. A8).

Specifically, the Trial Court made reference to John Hasso’s “conduct since the first verdict in attempting to shelter (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct.” (Emphasis added) (CT 1400) (App. A to Pet., p. A2).

In addition, the Trial Court felt compelled to state that “*the defendant has compounded his original fraud by weaving a web of deceit regarding his assets in which he became entangled during the second trial.*” (Emphasis added) (CT 1403) (App. A to Pet., p. A5).

The Trial Court made a specific finding that *John Hasso “committed perjury.”* The Trial Court stated in the Notice Of Decision:

“To put it bluntly, the Defendant has no credibility and, in this Court’s opinion, has committed perjury

⁹ In his Petition at p. 5, Hasso states that Judge Champlin stated he “disagreed with the verdict.” That is not true. Judge Champlin never made any such statement either expressly or by implication. If he had, this Court can be assured that Hasso would have directed its attention to a specific quote in the record below. Hasso did not because there is no such record. The same misleading information is stated by Hasso p. 7 of his Petition that the Statement read to the jury omitted facts which Judge Champlin and the Court of Appeal “had found in Hasso’s favor” That is flatly untrue. Judge Champlin and the Court of Appeal found any so-called “mitigating” facts irrelevant to the issues tried by the second jury.

during these proceedings. . . . The Defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and has reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to Defendant similarly." (CT 1403) (App. A to Pet., p. A5).

REASONS FOR DENYING THE WRIT

The Petition should be denied, because there are independent and adequate State grounds to support the Judgment. With respect to the evidence excluded by Judge Champlin at trial, he based his decision on three legal principles: the doctrine of *Res Judicata*, the rule that only relevant evidence is admissible, and under California Evidence Code § 352 and the rule of evidence empowering a trial judge to exclude prejudicial evidence that has slight probative value.

With respect to the admitted evidence of which Hasso complains, in most respects he waived any objection by his failure to make a timely and proper objection stating the grounds of the objection under California Evidence Code § 353. Furthermore, the evidence was admissible anyway on issues separate and apart from the issue of Hasso's reprehensibility. Therefore, that evidence would have come into the case in any event.

I.

THIS PETITION INVOLVES ONLY ORDINARY EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND CANNOT RAISE A CONSTITUTIONAL CHALLENGE EITHER TO THE CALIFORNIA STATUTE ESTABLISHING THE GROUNDS OF LIABILITY FOR PUNITIVE DAMAGES OR TO CALIFORNIA COMMON LAW STANDARDS FOR CALCULATING THE AMOUNT OF PUNITIVE DAMAGES.

California Civil Code § 3294 provides that in actions not arising out of a breach of contract, punitive damages may be

assessed against a defendant who has been found guilty of "oppression, fraud or malice." Hasso's Petition does not challenge the constitutionality of this statute.¹⁰

The three standards to be employed by a jury in calculating the proper amount of punitive damages "to punish wrongdoers and thereby deter the commission of wrongful acts" are set forth by the California Supreme Court in *Neal, supra*, at p. 928. For approximately fifty years, California trial courts have commonly used the Book of Approved Jury Instructions known as "BAJI."¹¹ BAJI 14.71 instructs a jury that in awarding punitive damages, it must consider (1) the reprehensibility of defendant's conduct, (2) the amount of punitive damages which will have a deterrent effect on the defendant in light of his financial condition, and (3) that the punitive damages must bear a reasonable relationship to the actual damages.

At the 1988 Trial, Hasso was represented by attorney John Gulick. Mr. Gulick proposed that the Court instruct the jury using a modified BAJI 14.71, requiring the jury to employ the three *Neal* standards in calculating the amount of punitive damages. The Court in fact adopted Mr. Gulick's proposed jury instruction and gave Mr. Gulick's 14.71 as part of the instructions on the law. During discussion between counsel and Court as to which jury instructions would be given, Judge Champlin stated:

"...I took your version of 14.71, Mr. Gulick. . . ."¹²

¹⁰ In any event, it would be too late for John Hasso to do so. The 1982 jury found that John Hasso had committed intentional fraud and his liability for compensatory and punitive fraud damages became final and non-reviewable at the conclusion of Hasso's appeal from the 1982 trial, in 1986. While the calculation of the amount of punitive damages did not survive Hasso's first appeal, his liability for punitive damages was established and became part of the Law of the Case, binding on the parties at retrial in 1988. *Lindsey v. Meyer* (1981) 125 C.A.3d 536, 541. Furthermore, there is no evidence Hasso complied with Rule 29.4(c), noticing the Attorney General of California that he challenges California Civil Code § 3294.

¹¹ California Jury Instructions, Civil, West Publishing Company (7th edition, 1986).

¹² RT 2203:4 to 2204:1. Attached as Appendix G. The actual jury instruction submitted by Hasso is reproduced as Appendix H.

The California Supreme Court has made it clear that if a party proposes a jury instruction, he waives any error or irregularity in that instruction. The California Supreme Court states in *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40 at p. 50:

"It is well settled that a party cannot attack the substance of an instruction if he himself proposed similar instructions."

Furthermore, Hasso never challenged BAJI 14.71 in the earlier 1982 trial, where the same instruction as to calculation of punitive damages had been given.

In a confusing preamble to the Questions Presented in the Petition, Hasso appears to invite this Court to review the Judgment in this case on the ground that the Napa Superior Court jury had "unbridled discretion" to award punitive damages against Hasso and therefore the award is unconstitutional. However, Hasso has waived any "due process" challenge to the BAJI 14.71 instruction given to the jury by proposing the instruction himself. Therefore, Hasso waived any due process concerns involving the relationship between net worth or actual damages and punitive damages and the use of reprehensibility as one of the standards by which punitive damages are calculated.

Simply, this case involves "ordinary evidentiary rulings" by a California Superior Court trial judge, and nothing more.

This is a lawsuit between private parties. There is no state or federal government entity prosecuting or defending this case. There is no insurance company involved. There is no business or industry involved, raising the spectre that this punitive damage award may be passed through to the consuming public or that industry research and development of new products will be discouraged.

The punitive damage assessment of \$2 million in this case simply requires Hasso to disgorge a portion of the profits he gained by his fraudulent conduct.

II.

HASSO FAILED TO RAISE AND PRESERVE FEDERAL DUE PROCESS OBJECTIONS TO THE EVIDENTIARY RULINGS OF THE TRIAL JUDGE AND THEREFORE WAIVED THEM AND THE COURT OF APPEAL DID NOT PASS ON HIS DUE PROCESS CLAIMS.

Hasso raised the same federal due process claims in his Petition for Review before the California Supreme Court (attached as Appendix K). Hasso's Petition for Review was denied *en banc* by a unanimous California Supreme Court. In that Petition for Review, Hasso admitted that he did not raise the "due process" argument until his Petition for Rehearing in the Court of Appeal¹³ (App. K, p. K7). He states:

"Preliminarily, while due process may have been mentioned explicitly for the first time on Hasso's Petition for Rehearing (App. A), he amply preserved both of the procedural points urged here. He argued, for example, that the various rulings 'effectively deprived defendant of a fair trial on punitive damages' (AOB 41) and 'violated settled law protecting a litigant's right to defend himself. . . .' (AOB 45)."

In California, issues must be raised and discussed in Appellant's Opening Brief. Hasso did not raise "federal due process" in his Opening Brief. Raising new matters in Appellant's Reply Brief is too late. The Court states the rule in *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 at page 641:

"New matters cannot be raised for the first time in a reply brief."

Hasso purported to *first* raise the issue of due process in the Petition For Rehearing. But that also is too late.

Very recently this Court, in a *California case*, made it clear that if Petitioner raises his "federal question" for the

¹³ Under California procedure, an appellant files an Appellant's Opening Brief. Respondent files a Respondent's Brief. Appellant is then afforded an opportunity to file an Appellant's Reply Brief. Oral argument is then set, and at the conclusion of oral argument the matter is deemed submitted for decision. When the Court of Appeal decides the case, it distributes the written Opinion and Judgment to the parties. At that time, either party may file a Petition for Rehearing.

first time in his Petition For Rehearing in the state court, that is too late. In the case of *Board of Directors of Rotary International v. Rotary Club of Duarte*, 48 U.S. 537, 550 (1987), this Court states at page 550:

“Appellants did not present the issues squarely to the [California] State Court until they filed their Petition For Rehearing with the Court of Appeal. The Court denied the Petition without opinion. When ‘the highest state Court has failed to pass upon a federal question, it will be deemed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show the contrary.’ (Multiple cases)”

In his Petition, Hasso states at p. 11:

“The trial court acknowledged that Hasso’s objections to the exclusion of evidence on the issue of reprehensibility were grounded in his due process right to defend himself. [RT 853:17-22].”

That is a remarkable attribution to Judge Champlin. He said nothing of the sort. His remarks at that point in the Reporter’s Transcript are as follows:

“But you got a whole different case. And I don’t, you know, you’ve got a finding of fraud, a finding of liability. That’s true. But I don’t think I can artificially paint Mr. Hasso into a corner in this case and allow this case to be re-tried so that he’s got both hands tied behind his back. He’s sorta got one hand tied behind his back because of the fraud finding.”

By no stretch of the imagination does this remark refer to “due process.” This was all in the context of an in limine discussion outside the presence of the jury at the beginning of the case. (See App. Q) When the admissibility of the specific evidence later came up, Judge Champlin ruled that the four pieces of evidence were irrelevant. (See App. P)

At page 11 of the Petition Hasso goes on to state that he argued in his motion for new trial and in the Appellant’s Opening Brief that the exclusion of mitigating evidence “vio-

lated fundamental due process." In point of fact, no such reference to "due process" appears anywhere in Appellant's Opening Brief. Perhaps that is why Hasso failed to comply with the mandate of Rule 14.1(h) to make "specific reference to the places in the record where the matter appears."

Raising the matter in a Motion for New Trial is too late, since it is after the close of evidence and entry of the verdict, and after the jury has been discharged and judgment entered in the case. At that point it is too late for the trial court to evaluate the merit of a "federal due process" argument and therefore too late to take corrective action.

It is correct that in his Appellant's Opening Brief, he stated that he had been deprived of a "fair trial" on punitive damages and that he was denied the right "to defend himself." But what does that mean? It certainly did not put the Court of Appeal on any notice that it should consider and "pass on" a "federal due process" argument under the Fourteenth Amendment to the United States Constitution. This Court will note that the Opinion of the Court of Appeal makes absolutely *no reference whatsoever* to "due process" or the "Fourteenth Amendment" or the "U. S. Constitution." Hasso utterly failed to bring any federal due process argument "squarely" to the attention to the Court of Appeal in a proper and timely manner. (App. B to Pet.)

Webb v. Webb, 451 U.S. 493 (1981), is right on point.

This Court states at page 499:

"It is appropriate to emphasize again (case) that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts *only where the record clearly shows that the federal issue has been properly raised below.* . . .

* * *

... Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on State authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.” (Emphasis added)

Finally, the two cases cited by Hasso at page 11 of the Petition are of no help to Hasso. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the petitioner had cited case authority in the state court in which the constitutional right had been described and understood, so that it was sufficiently well presented to the state court. In contrast, in this case in the trial court and in Appellant’s Opening Brief in the Court of Appeal Hasso did not cite one single case grounded on a due process right under the Fourteenth Amendment to the U. S. Constitution. Furthermore, in the *Taylor* case, the petitioner had asserted his constitutional claim in his briefing in the state appellate court. In contrast, Hasso did not mention federal due process in his Appellant’s Opening Brief.

In *Douglas v. Alabama*, 380 U.S. 415 (1965) the petitioner *did* make a timely objection in the trial court grounded on his right to confront witnesses and the Alabama Court of Appeal did “pass on” that issue in its opinion. Neither event occurred in this case.

In *Browning-Ferris*, this Court has recently stated the importance of a “developed record” on a federal due process challenge to punitive damages, stating that this Court “shall not attempt to decide the question in the absence of a record on the due process point. . . .” developed in the trial court and in the intermediate Court of Appeal. *Browning-Ferris*, *supra*, at p. 2921, fn. 23. There is no “developed record” in this case.

John Hasso has waived any federal due process objection and Respondent respectfully submits that this Court is without jurisdiction to grant the Petition.

III.

JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN EXCLUDING FOUR PIECES OF DISCRETE EVIDENCE.

A trial court has considerable latitude in making ordinary evidentiary rulings.

The four pieces of evidence of which Hasso complains are discussed and analyzed in the Opinion of the Court of Appeal. (App. A to Pet., pp. B17-B20) The essential fact of John Hasso's basic fraud was his false promise, made at the beginning of the business venture in early 1977, to share profits from the properties with Duggan. Trial Judge Champlin determined that these four pieces of evidence were irrelevant to the issues presented to the jury at the second trial regarding recalculation of damages because they did *not* mitigate his fraudulent false promise. (App. A to Pet., pp. A1-A2) The three-judge panel on the Court of Appeal agreed with Judge Champlin, stating in the Opinion at Appendix B to Petition B17-B18:

"None of [the four pieces of evidence] had any bearing on Hasso's false promise to share his profits with plaintiff, and our overall assessment is that the probative value of this evidence, if any, on the issue of Hasso's reprehensibility would have been slight by comparison to its potential for confusion and undue consumption of time. Accordingly we find no abuse of discretion associated with its exclusion under Evidence Code section 352."

Hasso fails to explain how each of the four pieces of evidence would have tended to mitigate his reprehensibility. (Pet., pp. 13-20)

Even if the evidence had any slight probative value on Hasso's reprehensibility, it was substantially outweighed by its potential for confusion and undue consumption of time under California Evidence Code § 352, which provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."¹⁴

With regard to irrelevant evidence and due process, the California Supreme Court stated in *People v. Babbitt* (1988) 45 Cal.3d 660 at page 685:

"Here, because defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to section 352 *did not implicate any due process concerns.*" (Emphasis added)

The California Supreme Court stated in another recent case, *People v. Hall* (1986) 41 Cal.3d 826 at page 834:

"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."

The four pieces of so-called mitigating evidence did not implicate federal due process.

¹⁴ Federal Rule of Evidence 403 is similar and provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

IV.

JUDGE CHAMPLIN MADE ORDINARY EVIDENTIARY RULINGS IN ADMITTING EVIDENCE OF HASSO'S PATTERN OF FRAUDULENT CONDUCT AFTER THE 1982 TRIAL IN TRANSFERRING AND LYING ABOUT HIS ASSETS SO AS TO AVOID COLLECTION EFFORTS FOR COMPENSATORY DAMAGES AND LIABILITY FOR PUNITIVE DAMAGES.

Under California law, a jury may consider the conduct of the defendant *right up to the time of trial* in fixing the amount of punitive damages "necessary in order to get defendant's attention." *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 638.

Two primary purposes of a punitive damage award are *punishment* and *deterrence*. *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790. Hasso engaged in "deceit" when he defrauded Duggan in 1977-1978. Hasso's repeated "deceits" from the 1982 Trial continuously on through the 1988 Trial, to which the Trial Court refers in its Notice of Decision (App. A to Pet.), were part of the same pattern of wrongful conduct. (See Statement of the Case, *supra*)

The Trial Court felt compelled to state in the Notice of Decision (App. A to Pet., p. A6):

"The Defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth." (CT 1403-1404)

Hasso has not described in his Petition the specific litigation conduct evidence that was admitted at trial which infringed on his federal due process rights. How is this Court to evaluate John Hasso's claim unless it is informed of the specific challenged evidence?

Hasso failed to object to most of this evidence and thereby waived any alleged error. Furthermore, this evidence was relevant and admissible on issues of Hasso's credibility and his financial net worth, whether or not these matters had probative value on his reprehensibility.

California Evidence Code § 353 specifically provides that Hasso waived any objections which were not “timely made and so stated as to make clear the specific ground of the objection” The Court of Appeal states in the Opinion (App. B to Pet., p. B24):

“Most all of the evidence and argument to which defendant refers came in without objection, not because any objection would have been futile as defendant now claims, but because the argument was within the scope of the evidence, and the evidence was relevant to net worth or credibility or both. We find no error in connection with any of these matters.”

Hasso apparently makes a related claim that he should have had pre-trial notice of the evidentiary facts which would be presented at trial on the issue of his reprehensibility. Under California Code of Civil Procedure § 2030, Hasso could have taken the simple pre-trial step of submitting contention interrogatories to Duggan, for the purpose of ascertaining the facts on which Duggan would rely in presenting evidence on the issue of his reprehensibility. Hasso failed to do this.

Hasso has simply failed again to elevate ordinary evidentiary rulings by Judge Champlin into “an important question of federal law” requiring this Court to grant Hasso’s petition.

V.

THE COURT’S DECISION IN *BROWNING-FERRIS* FORECLOSES HASSO’S ARGUMENT THAT THIS COURT SHOULD ESTABLISH PROPORTIONALITY STANDARDS TO APPLY TO PUNITIVE DAMAGE AWARDS IN FEDERAL AND STATE COURTS IN ALL FIFTY STATES.

There are two (2) distinct but separate uses of the phrase “excessive damages,” one of which was raised in the Trial Court and in the Court of Appeal and one which was *not* raised. Hasso did raise the question of whether the punitive

damage award of \$2 million was “excessive” in the discrete and specific sense of whether the governing three (3) legal standards for calculating punitive damages were properly applied to the specific facts of this case. *Neal, supra* at p. 928.

In contrast, Hasso *never* raised the question of whether the punitive damage award was “excessive” in the sense that the Napa Superior Court jury in this case had “unbridled discretion to award punitive damages” or in the sense that the standards set by the California Supreme Court in *Neal, supra*, are themselves unconstitutionally vague or fail to provide sufficient “procedural safeguards.”

This Court recently made it clear that the issue of “excessiveness” of punitive damages under state law is a matter for state law courts to determine. In *Browning-Ferris, supra*, this Court states at page 2922:

“Although Petitioners and their *amici* would like us to craft some common-law standard of *excessiveness* that relies on notions of proportionality between punitive and compensatory damages, or makes references to statutory penalties for similar conduct, these are matters of State, and not Federal, common-law. *Adopting a rule along the lines Petitioners suggest would require us to ignore the distinction between the State law and Federal law issues. For obvious reasons we decline that invitation.*” (Emphasis added)

This Court also states at page 2921:

“It is not our role to review directly the award for excessiveness or to substitute our judgment for that of the jury.”

The question of whether the \$2 million punitive award is excessive because the punitive damages are “disproportionate” to the compensatory damages is a state law issue. The question of whether the punitive damages are excessive because they are disproportionate to the wealth of the defendant is a state law issue. Furthermore, Hasso waived these issues.

Hasso never challenged the constitutionality of the standards themselves, so he has no standing to invoke the discretionary jurisdiction of this Court on that issue in this case.

VI.

IT WOULD BE A MISCARRIAGE OF JUSTICE FOR THIS COURT TO GRANT HASSO'S PETITION AND TO REVERSE THE TWO MILLION DOLLARS PUNITIVE DAMAGE JUDGMENT IN VIEW OF THE FACT OF HASSO'S PERJURY AT TRIAL AND THE FACT THAT HE IS ONLY REQUIRED TO DISGORGE A PORTION OF THE PROFITS HE GAINED BY HIS FRAUDULENT CONDUCT.

The Judgment below is the correct one.

The purpose of punitive damages in California is to punish wrongdoers and to discourage them from engaging in further wrongdoing. (*Neal, supra* at p. 928)

In the usual fact pattern in a punitive damage case, the assessment of punitive damages invades the assets of the defendant which were accumulated independent of the wrongful conduct. That is, the defendant is normally required to pay over money out of defendant's personal wealth, separate and apart from any accretion to his wealth directly resulting from the wrongful conduct. That fact is the true nature of the "punishment" and the true disincentive to again engage in similar wrongdoing.

However, is there really punishment and deterrence where the wrongdoer's wealth is untouched by the punitive damage award, and he is only required to disgorge a part of the profit which he gained as a direct result of his fraudulent conduct? If a wrongdoer still profits by his wrongful conduct, even though it is less than he originally planned, he may well conclude that the next time around he will enjoy complete success.

In this case, Hasso and Duggan agreed the profit from the properties was \$3,367,284 (rounded to \$3.3 million) (Trial Exhibit 16). The amount of profit was calculated as to each property *as of the date of sale*. All proceeds from sale of each property were received and retained by Hasso.

Appendix L is a "profit on profit" chart used in the courts below as to each of the properties, bringing the amount of the profit on each sale forward in time to the time of trial in 1988 using a 10% annual compounded interest factor. Based upon this reasonable interest factor, the accretion to the profit generated an additional \$2 million.

Accordingly, the true economic profit gained by John Hasso as a result of his fraudulent conduct was \$5.3 million (rounded).

The compensatory damages were \$483,594 (CT 1076) (rounded to \$500,000). If we deduct the compensatory damages of \$500,000 and the \$2 million punitive damage assessment from the \$5.3 million economic profit, John Hasso is still left with *\$2.8 million* of the economic profit gained from his fraudulent conduct.

All of his assets independent of this profit are completely untouched by the punitive damage assessment. The profit of \$3.3 million was calculated by taking all of the money John Hasso had put into the common business enterprise to purchase the properties and to pay expenses on the properties and deducting those amounts from the gross proceeds from the sale of the properties. This was the formula for computing profits to which both Hasso and Duggan agreed and the jury was so instructed in the Statement read to the jury (App. I, p. 15).

Accordingly, there was no invasion of any assets owned or accumulated by Hasso. He is only required to disgorge some of the fraudulent profits.

Even if we disregard the reasonable calculation of a \$2 million accretion based upon availability and use of the profits over a period of years, we still have an *agreed profit* of \$3.3 million. If we deduct compensatory damages and punitive damages of \$2.5 million, Hasso still has a net profit of \$800,000. The Court of Appeal observed that the profits exceeded the damage award. (App. B to Pet., p. B33)

In either circumstance, can it fairly be said that John Hasso has been punished? Can it fairly be said that he has

been discouraged from ever again attempting to defraud a business partner?

Hasso not only committed intentional fraud on Duggan, but he engaged in a pattern of lying and deceit spanning a period of many years. Judge Champlin remarked (App. A to Pet., p. A8) that the punitive damage assessment of \$2 million:

“ . . . is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant’s compounding conduct during the last several years, *all of which have been an affront to the court system and this community’s sense of fair business practices.*” (Emphasis added)

Charles Duggan respectfully urges this Court to bring this 13-year lawsuit to a prompt conclusion by ruling during June 1990 denying Hasso’s Petition for Writ of Certiorari.

Hasso baldly seeks further delay in this matter by suggesting this case be tied to the disposition of *Pacific Mutual Life Ins. Co. v. Haslip* (Ala. 1989) 553 So.2d 537, *cert. granted*, 110 S.Ct. 1780 (April 2, 1990). There are significant differences between these two cases. First, in this case the ratio of punitive damages to compensatory damages is 4.2 to 1. It appears that the ratio in *Pacific Mutual* is apparently in the range between 40 to 1 and 400 to 1.

Second, in this case it was Hasso himself who perpetrated the fraud. In contrast, in *Pacific Mutual* the insurance company was held liable under *respondeat superior* for the apparent acts of an agent, on an insurance policy which Pacific Mutual apparently did not issue.

Third, this case does not implicate the prospect of affecting the operating procedures of an industry like insurance which affects a large segment of society. The dispute between Duggan and Hasso is a dispute between private parties that will have absolutely no effect on any industry and will not result in any real or apparent “pass through” of the punitive damage award to members of the consuming public.

Fourth, in addition to the basic intentional fraud, Hasso’s pervasive lies and deceit over many years was an “affront to

the court system” to use the words of The Honorable Philip A. Champlin, sitting as trial judge. Hasso lied to a federal bankruptcy court (see Appendix N), he lied in sworn declarations under penalty of perjury to both the Napa Superior Court (Appendix M) and the Court of Appeal, and he lied to the jury in the five-week 1982 trial and to the jury in the four-week 1988 trial. In contrast, there does not appear to be any evidence in *Pacific Mutual* of such a protracted and flagrant and intentional abuse of judicial process.

Fifth, in this case Hasso has waived any due process challenge either to California Civil Code 3294 or to the three standards for calculating the amount of punitive damages set forth in BAJI 14.71.

The California legislature has specifically expressed a policy regarding a speedy resolution to disputes in California Government Code § 68601(b) which states:

“Delay in resolution in both Civil and Criminal litigation is not in the best interest of this State and the public. The people of the State of California expect and deserve prompt justice and the speedy resolution of disputes. . . . Delay reduces the chance that justice will in fact be done, *and often imposes severe emotional and financial hardship on litigants.*”

By attempting to tie this case to *Pacific Mutual*, Hasso is attempting at the very minimum to delay disposition of his Petition until the October 1990 Term of this Court or beyond, when this case is already in its 12th year.

CONCLUSION

Respondent Charles Duggan respectfully asks this Court to deny John Hasso's Petition for Writ of Certiorari during June 1990, to transmit the Order Denying Petition immediately to the California Court of Appeal, and to grant such further relief as the Court may deem just and proper in the circumstances.

DATED: May 31, 1990

Counsel of Record:

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Attorney for Respondent

APPENDIX G

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S DECISION TO USE PETITIONER'S PROPOSED 14.71 JURY INSTRUCTION [RT 2203:4 - 2204:1]

MR. JACOBSON: And the other thing I had, your Honor, was I—on punitive damages the 14.71 instruction. I don't know that we ever concluded as to whether or not—or what the first sentence would be.

And I had proposed, in my first sentence to 14.71 to read as follows. And I quote, it has been established that you should award punitive damages against defendant's John Hasso, Elissa, N.V., Pacific Midland, N.V., and Rumba N.V., for the sake example and by way of punishment close quote. And I didn't know what your Honor intended on that introductory—

THE COURT: The one I had before me that I intended to give reads you shall award punitive or exemplary damages against defendant's for the sake of example and by way of punishment.

MR. JACOBSON: That's fine, your Honor.

THE COURT: The law provides no fixed standard as to the amount of such punitive damage. I think 14.71 is verbatim.

MR. JACOBSON: Is it?

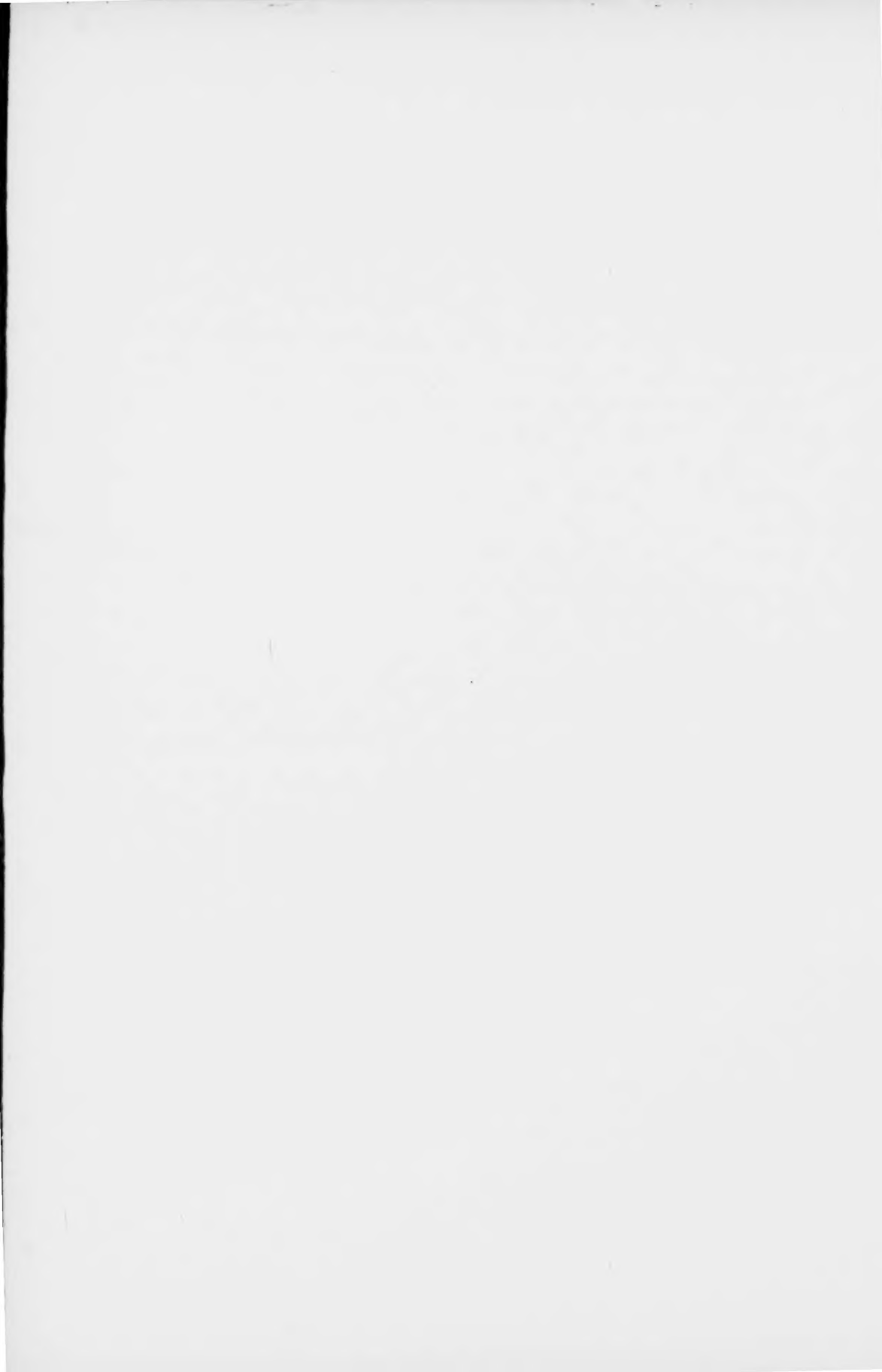
MR. GULICK: Well, I changed it to shall—I mean—

THE COURT: Yeah. Right.

MR. GULICK: Instead of may.

THE COURT: I think that's your—I took your version of 14.71, Mr. Gulick. Anything else? (Emphasis added)

[RT 2203:4 - 2204:1]



APPENDIX H
HASSO
JURY INSTRUCTION NO. 25
BAJI 14.71

PUNITIVE DAMAGES—RECOVERY OF AND MEASURE

You shall award punitive or exemplary damages against defendants for the sake of example and by way of punishment.

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damage which will have a deterrent effect on the defendants in the light of defendants' financial condition.

(3) That the punitive damages must bear a reasonable relation to the actual damages.

GIVEN /s/ P.C. _____

REJECTED _____

MODIFIED _____

WITHDRAWN _____

[CT 1053]

APPENDIX I

STATEMENT READ TO THE JURY

"These are the facts that have been established as a result of the first trial that everybody has made reference to. And these are all to be accepted by you as givens in the case. There will be no further proof necessary or other evidence necessary to establish these facts.

All right. Ladies and gentlemen this case is coming back for retrial on the issues of compensatory and punitive damages following an earlier trial where the issue of the Defendants' liability for those damages to the Plaintiff was established. In other words, you will only be concerned with recalculating the damages due from Defendants to Plaintiff, an earlier determination having been made that Defendants defrauded Plaintiff.

The facts as established in the earlier proceedings are as follows: Prior to immigrating from South America, where he was born, Plaintiff Charles A. Duggan, practiced law there. In 1969 Mr. Duggan became an instructor at Pacific Union College in Napa County. A number of years later Mr. Duggan met Jennifer Hasso, who was a student at the college and the daughter of John Hasso and Hebe Hasso. At about the same time, the defendant, John Hasso, moved to the Napa Valley from the Middle East where he had been a distributor for a number of major American companies. Charles Duggan and the Hasso's became social friends after Jennifer Hasso introduced him to her parents.

In the Spring of 1977, John Hasso and Charles Duggan discussed their mutual interest in real estate investment. Charles Duggan told John Hasso that he was familiar with the real estate market in Napa County and knew how to subdivide and develop property. John Hasso, in turn, told Charles Duggan that he hoped to avoid paying a ten percent brokers' commission at the time of the purchasing real estate and wanted to work with somebody that would 'ride with him'.

As a result of their conversation, Charles Duggan took John Hasso to view two potential purchases. The Noonan Winery Property and the Plateau Ranch Property. They discussed working together in a partnership arrangement with John Hasso providing funds to purchase, maintain and develop properties and Charles Duggan assuming responsibility for locating, evaluating and negotiating the purchase and sale of the properties. They agreed that John Hasso would receive an 85 percent interest and Charles Duggan a 15 percent interest in the capital of the partnership and in the partnership profits. They did not agree at that time on further details of the arrangement such as the meaning of 'capital'. However, by promising to loan Charles Duggan \$50,000 for living expenses after Charles Duggan indicated that his partnership responsibilities would require him to take a leave of absence from his teaching duties, John Hasso demonstrated his own belief that they had formed a working relationship. This loan was later discharged by the transfer of the some real property to John Hasso.

Shortly thereafter, John Hasso left on a trip to the Middle East. While he was away, John Hasso maintained communications with Charles Duggan regarding the progress of Duggan's activities. Based on those communications, Charles Duggan negotiated the purchase of the Noonan Winery and Plateau Ranch Property. Charles Duggan executed the purchase contracts and later, when escrow closed, title to the winery properties was taken in the name of Hebe Hasso and the ranch title was taken in the name of Kim Susan Hasso, one of Hasso's daughters.

During his overseas trip, John Hasso obtained tax advice from an English attorney that suggested that he form a corporation in the Netherlands Antilles, a tax haven, and take title to the properties being purchased in the name of that entity. Based on that advice, John Hasso incorporated an entity named Elissa N.V., and later had title to the Plateau Ranch Property transferred to Elissa N.V. from his daughter. When Elissa N.V. was liquidated in 1979, the assets held in its name were transferred to two other entities known as Pacific Midland N.V. and Rumba N.V., which were two

other Netherlands Antilles Corporations that were nominally owned by John Hasso's mother-in-law, both of which were actually managed and controlled by John Hasso.

While John Hasso was still outside the United States, Charles Duggan located several more properties for possible acquisition. These included the Watts Property, the Valley View Property, and two Lake Tahoe condominiums. When John Hasso returned from the Middle East, he agreed that Charles Duggan should ask attorney George Humphreys to prepare a formal partnership agreement. Charles Duggan was not admitted to practice law in California. He and Humphreys previously performed a partnership in which Charles Duggan rendered international legal advice. John Hasso and Charles Duggan later met in Humphreys' law office and executed a Memorandum of Understanding concerning their joint undertaking. Humphreys told John Hasso that the memorandum was a temporary, incomplete, document because it did not identify the property involved. Charles Duggan mentioned that future acquisitions would require separate joint venture agreements and expressed his concern that the Memorandum did not reference Hebe Hasso or Elissa N.V. He was also concerned that the meaning of 'partnership capital' was not defined.

In the months which followed execution of the Memorandum of Understanding, the previously identified properties (Watts, Valley View and Lake Tahoe condominiums) were purchased. Two other properties, Trancas Avenue and Main Street, were also acquired. Title to the Lake Tahoe condominiums was taken in Hebe Hasso's name, while all the other properties were purchased in the name of Elissa N.V., John Hasso and Charles Duggan agreed that Charles Duggan was to receive 15 percent interest in the five properties which he had located and negotiated to purchase. In the case of the Trancas Avenue and Main Street properties, they agreed that Charles Duggan would receive lesser interest, (five percent and ten percent respectively) because they were located by John Hasso. The total amount paid for all of the properties was 1,649,355.08.

After five months—pardon me—about five months after the Memorandum of Understanding was executed, Charles Duggan presented John Hasso with a draft joint venture agreement that had been prepared by attorney Humphreys. In addition, to Charles Duggan and John Hasso Elissa N.V. was named as a party to the agreement. It provided that no party had the right to withdraw capital from the venture without the written consent of other parties. Blanks were left in the draft agreement so that the properties it covered could be identified and other blanks were left for the percentage interests in capital and income held by each party. John Hasso told Charles Duggan that he found the agreement too complicated and declined to sign it. However, he agreed to put Charles Duggan's name 'in title for 15 percent of the property'. Several weeks after Charles Duggan and John Hasso discussed the draft agreement, John Hasso wrote to Charles Duggan describing their past agreement as one of 'business partners'. In the letter John Hasso informed Charles Duggan that he saw no need to come to a proposed meeting to discuss the partnership agreement because he, John Hasso, was terminating their relationship.

Charles Duggan later filed this lawsuit naming John Hasso, Hebe Hasso, Kim Susan Hasso and Elissa N.V. as Defendants. He requested general and punitive damages based on a fraud claim. Prior to trial, Charles Duggan amended his pleading in order to name Pacific Midland N.V. and Rumba N.V. as additional Defendants.

At the first trial, Charles Duggan presented evidence from which the jury could infer that the Defendant, John Hasso's, net worth was in excess of ten million dollars. The Claim of fraud was tried to a jury. Charles Duggan prevailed on his fraud theory. By its unanimous verdict, the jury also found that the Defendants John Hasso and the three Netherlands Antilles Corporations had committed intentional fraud against Charles Duggan. The jury found against John Hasso on his counterclaim of fraud against Charles Duggan.

The verdict was appealed by the Defendants. The Court of Appeal upheld the jury's verdict based on fraud, but ruled that the Plaintiff's damages were not properly calculated and sent the case back for a retrial to recalculate compensatory and punitive damages.

In part it will be the responsibility of this jury to determine Plaintiff's compensatory damages based upon the profit resulting from these transactions. Mr. Hasso and Mr. Duggan agree that any profit on the sale of these properties, would be calculated by taking the sales price and deducting the purchase price plus any expenses relating to the properties.

For your convenience, a list of the properties showing its date of purchase and the date of sale—of each property is attached to this statement of facts.

I'm not going to read that to you today, but it will be attached and you will be given a copy of this statement of facts when you come back tomorrow.

This statement of facts that I just read to you will be made available to you for consultation during the trial. At the conclusion of the case you will be instructed on the applicable rules of law by which you should be guided in evaluating compensatory and punitive damages.

All right, ladies and gentlemen that's the statement of facts. That's the last time I'll read it to you. You will have a copy of it."

[RT 823:20 - 829:28]

APPENDIX J

FILED MAR 21 1988

JANICE NORTON

Napa County Clerk

BY /s/ K. A. MIERSCH

DEPUTY CLERK

JOHN N. GULICK, JR.
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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF NAPA

CHARLES A. DUGGAN,

Plaintiff,

v.

JOHN HASSO, *et al.*,

Defendants.

No. 39856

**DEFENDANTS'
PROPOSED
PROCEDURAL
AND FACTUAL
STATEMENT TO
BE READ INTO
THE RECORD**

A Court of Appeal decision which recites the facts found in a trial will support the application of the doctrine of collateral estoppel (*Tushinsky v. Arnold* (1987) 195 Cal. App. 3d 666, 672-673n5; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal. App. 3d 39, 45-46). This means that the recitation of the facts found by the Jury as gleaned from the record by the Court of Appeal is an adequate statement of facts that the Court and Jury should determine to have been found. Thus, to avoid error and to be fair to the parties, Defendants submit that the Court of Appeal decision and

recitation of the facts in the opinion should be adopted by the Trial Court as an error proof statement of what the record shows with respect to factual determinations. To permit the parties to argue the findings of other facts would be contrary to the doctrine of collateral estoppel.

Ordinarily, the doctrine of collateral estoppel which is a secondary aspect of *res judicata* precludes the relitigation of issues that necessarily were determined between litigants in an earlier action. For instance, the California Supreme Court observed the following with respect to the doctrine of collateral estoppel in the case of *Clark v. Lesher*:

“This aspect of the doctrine of *res judicata*, now commonly referred to as the doctrine of collateral estoppel, is confined to issues actually litigated. It is not an easy rule to apply, for the term “issue” as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was arised even though some legal theory, argument or “matter” relating to the issues was not expressly mentioned or asserted.” (*Clark v. Lesher* (1956) 46 Cal. 2d 874, 880-881).

The cases that apply the doctrine of collateral estoppel referred to the doctrine as “issue preclusion”. If issues are determined in the case, their relitigation is completely precluded in the later litigation. This means that if an issue of law or fact is litigated and determined, that eliminates the relitigation of that issue later (*People v. Sims* (1982) 32 Cal. 3d 468, 484; *J. R. Norton Co. v. Agricultural Labor Relations BD.* (1987) 192 Cal. 3d 874, 884-885; *Rosenfield, Meyer & Susman v. Cohen* (1987) 191 Cal. App. 3d 1035, 1062-1063).

The solution to the trial court in this case given the admonition of *Clark v. Lesher* concerning the difficulty of determining what issues have been decided, comes in the form of the appellate decision. The Appellate Court recited facts and procedure for 8 pages after reviewing the arguments and the record on appeal in its entirety. Under the doctrine of collateral estoppel as articulated in *Weiner v. Mitchell*,

Silberberg & Knupp, that appellate opinion establishes the existence of these facts. Defendants submit that the Trial Court can short circuit a lengthy dialogue or dispute over which issues has been determined and what facts are established by simply looking to the appellate opinion. In this way, the Court is acting in accordance with the rules articulated by *Tushinsky & Weiner* regarding the record and recitation of facts by a Court of Appeal. If the Court recites the facts as contained in the Appellate opinion, it is certain that it will be free of error. This would appear to be the most prudent and time saving course available to the Court.

[CT 883 - 855]

APPENDIX K

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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
|-----------------------------------|---|
| CHARLES A. DUGGAN, | } No. A042843 NAPA COUNTY SUPERIOR COURT No. 39856 PETITION FOR REVIEW |
| <i>Plaintiff and Respondent,</i> | |
| v. | |
| JOHN HASSO <i>et al.</i> , | |
| <i>Defendants and Appellants.</i> | |

TO THE HONORABLE MALCOLM M. LUCAS, CHIEF JUSTICE OF
CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES
OF THE CALIFORNIA SUPREME COURT:

Defendants and appellants, John Hasso, *et al.* ("Hasso"), respectfully petition for a review of two closely related issues in the opinion below. This case presents an appropriate and compelling occasion for an exercise of this Court's selective review power. *See*, Cal. Const., art. VI, section 12, and Rules of Court 29.2 and 29.4.

I.

ISSUES PRESENTED FOR REVIEW

A.

When a civil action had been remanded for a new trial on punitive damages but not liability, could the defendant be precluded from contesting the alleged reprehensibility of

the very conduct for which he was facing severe punishment? (Opinion, pp. 15-17) May the resulting \$2,000,000 punitive damages award be upheld on the theory that trial courts may limit trial evidence in their discretion? (Op., pp. 17-20)

B.

When the only pleaded conduct supporting any punitive damages award in this case was an alleged fraudulent promise made in 1977, could such an award be assessed at trial, and later approved on appeal, even in part on the basis of a so-styled "pattern of fraudulent conduct since the first trial" (Op., p. 32), namely, a miscellany of unpleaded charges of misdeeds between 1982 and 1988, prominently including steps taken in the defense of this lawsuit? (Op., pp. 5-10, 20-26, 31-32)

II.

REASONS FOR GRANTING A REVIEW

A. Introduction

California's "civil" punishment system has gone haywire. Mr. John Hasso was supposed to be on trial for the conduct alleged in the complaint against him, a 1977 promise to an acquaintance about a prospective real estate venture. (Op., pp. 2-3) But Mr. Hasso was prohibited from defending or mitigating his 1977 conduct before the jury. He was tried, instead, on a hodgepodge of unpleaded charges of subsequent misconduct. The trial and resulting award are frighteningly irreconcilable with the state and federal guarantees of due process.

Only recently, this Court held that "[D]ue process requires . . . fair notice of the nature of the penalties and proceedings he faces. . . ." *Mitchell v. Superior Court* (Dec. 28, 1989) 90 C.D.O.S. 39, 44. If the Mitchells were entitled to a written statement of which statutes they were facing in a misdemeanor-level contempt prosecution, was a punitive damages defendant not likewise entitled to some pleading,

at least, articulating this \$2,000,000 “pattern of fraudulent conduct”? (Op., p. 32) And how could a reviewing court then rely principally on such a “pattern” to justify the severe punishment below (Op., p. 32), especially when the only *pleaded* conduct had been excluded from the trial? What about the right to a “meaningful” opportunity to defend? *Rios v. Cozens* (1972) 7 Cal.3d 792, 797.

B. Which Crime Fits the Punishment?

After a brief synopsis of the case, the opinion correctly observes that “Punitive damages . . . became the principal focus of the second trial.” (Op., p. 4) Thus, one would next expect a description of the conflicting evidence and arguments at the trial about the reprehensibility of the conduct in question—the conduct, after all, for which the new “penalty phase” trial had been ordered.

But *that* conduct had been held to be off limits at the new trial. (Op. pp. 15-20) The court had rules that “This is a case that’s limited to damages . . . ;” that evidence about the actual conduct in dispute could be “terribly confusing to the jury . . . ;” and that it would suffice—and afford “equal treatment”—to read a short summary of the underlying facts. (All quotes at Op., p. 17)

Although the degree of reprehensibility of the conduct in question would seem to be the very touchstone for assessing and then reviewing any punitive damages award, the trial court flatly precluded Mr. Hasso for defending and attempting to mitigate his 1977 conduct. In the words of the pertinent subtitle of the opinion, there had been an “exclusion of evidence of [the] parties’ initial relationship.” (Op., p. 15) The opinion finds no error and no harm in this approach.

What, then, was the trial all about? Page one of the respondent’s brief below (filed June 12, 1989) correctly described the conduct actually in issue: the alleged “false promise to share profits . . . in the Spring of 1977.” By page 97 of the same brief, however, respondent was concluding with his oft-repeated charge that there had been “eleven (11) years of fraud and deceit.”

The opinion below fleshes this out. In lieu of any discussion of the reprehensibility of Mr. Hasso's conduct in 1977, the opinion quotes extensively from the trial court's harsh views about Mr. Hasso's credibility as a witness regarding his assets. (Op., pp. 4-10) That primarily, plus an assortment of charges "about actions taken in the defense of the lawsuit" (Op., p. 20 *et seq.*), add up to the theme of "eleven years of fraud" in this case. And this "eleven years" argument was upheld as perfectly permissible to the jury, too (Op., p. 23), although neither the opinion nor the respondent can point to an articulated legal theory giving Mr. Hasso notice of such an expansive and litigation-centered punitive damages claim against him.

Even more surprising, however, is the opinion's invocation of the "eleven years of fraud" theme to justify the size of the punitive damages award. The opinion acknowledges that "Reprehensibility of the defendant's conduct is one of the factors to be considered in assessing punitive damages." (Op., p. 31) But then, in response to Mr. Hasso's contention that he was only supposed to be punished for the pleaded conduct in 1977, the opinion states as follows:

This argument overlooks all of the evidence outlined in section I(C), *supra*, [pp. 5-10] from which the jury could infer that defendant had engaged in a pattern of fraudulent conduct *since the first trial* by transferring and lying about his assets so as to avoid liability. Defendant contends that this court "mandated" a retrial relating to "the conduct affirmed in the original appeal as fraudulent," but we did not grant defendant a license to misrepresent his net worth. . . . [T]here is no reason why deceit during the course of litigation should be treated differently for purposes of punitive damages than any other form of fraud. (Op. p. 32) (Emphasis added)

But "deceit during the course of litigation" had never been articulated as a charge in this case! Certainly, it had never passed muster against a demurrer.

In short, the trial was a completely unbounded, free floating attack. And then, incredibly, the reviewing court cites that very unboundedness as the basis for affirming the \$2,000,000 punishment that resulted: "In light of the pattern of fraudulent conduct, we are unable to conclude that the award was excessive in relation to reprehensibility." (Op., p. 32)

C. Impact on Petitioner

John Hasso is an individual, not a business enterprise. He is unable to pass along or spread out a \$2,000,000 punishment among his customers or different product lines. Nor was he ever charged with making fraudulent promises to others. He also paid the compensatory damages award after the new trial (*see*, RB 17), so this appeal has always been limited to the punitive award.

It would be unconscionable to leave undisturbed the \$2,000,000 punishment in this case. Aside from the ripeness and general import of the legal issues presented, John Hasso the individual should simply not be punished in this state and this country in the manner that he was. Alice had better justice in Wonderland; she kept her head.

One might also recall several of the original circumstances in 1977 that presumably dictate the contours of this lawsuit. Hasso and respondent Duggan had orally agreed to certain general terms for a mutual real estate venture (RB 20), but they never settled some important details of Duggan's prospective interest. (*Id.*) As a result, and in the absence of any effective written agreement, it has already been determined in this lawsuit that "no partnership existed. . . ." (Op., p. 3)

The opinion also mentions briefly that Hasso had "declined to execute a more detailed joint venture agreement and eventually advised plaintiff that he was terminating their relationship." (Op., p. 3) Might the penalty-phase jury have properly considered the fact that the document Hasso rejected had been prepared by a Duggan attorney who passed himself off as Hasso's attorney, and that the document substantially

avored Duggan beyond any terms Hasso had ever even discussed? (Findings 6 and 8, C.T. [first trial] 1257-1258; and R.T. [first trial] 567-68, 1121-1124) And might the jury have properly considered Hasso's other reasons, too, for terminating his business relationship with Duggan? (See AOB [first appeal] 32-33) Just how reprehensible was Mr. Hasso's conduct?

There was every reason to accord this defendant the ordinary right to explain and attempt to mitigate the conduct for which he was facing a severe punishment. Deprived of that basic right, and exposed instead to a truly demagogic attack for "eleven years of fraud," Hasso should not suffer the blow of the \$2,000,000 punishment that resulted.

D. Impact on the Public

Finally, it is too late in the day to question the significant public impact of punitive damages award. The United States Supreme Court has already observed that due process and other challenges in this area "raise important issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 828-829. Justice O'Connor recently catalogued some of the heavy burdens of "skyrocketing" punitive damages awards upon American society. *Browning-Ferris v. Kelco Disposal* (1989) 106 L.Ed.2d 219, 242-243 (O'Connor, J., concurring and dissenting). This need not be reiterated here.

California is hardly a jurisdiction that shies from large punitive awards. The opinion below makes the usual unprincipled defense of the instant award by citing even larger ones elsewhere. (Op., pp. 30-31) California's housing inflation pales by comparison.

Whatever salutary purposes a large punitive award might serve in an individual case, the number, escalating size and public impact of punitive awards in California today call mightily for the measuring hand of tighter due process controls. That can only come from this Court. The lower

appellate courts will evidently not move first in this direction. (See *post*, p. 11)

III.

THE SCOPE OF A REVIEW

Preliminarily, while due process may have been mentioned explicitly for the first time on Hasso's petition for rehearing (at p. 8), he amply preserved both of the procedural points urged here. He argued, for example, that the various rulings "effectively deprived defendant of a fair trial on punitive damages" (AOB 41) and "violated settled law protecting a litigant's right to defend himself. . . ." (AOB 45) In any event, though, these timely and highly significant Constitutional issues should be addressed even if Hasso had failed to raise them adequately below, *see, e.g., Hale v. Morgan* (1978) 22 Cal.3d 388, 394, "especially when the enforcement of a penal statute is involved. . . ." (*Id.*)

Fair notice and a fair opportunity to defend are fundamental hallmarks of due process. Are they inapposite in a punitive damages case just because it is labeled "civil"? Presumably not. *Hale v. Morgan, supra*, applied due process to a much more modest "civil" penalty against landlords, 22 Cal.3d at 398-399, but this threshold question manifestly needs to be settled in the punitive damages context.

The United States Supreme Court recently observed, in *dictum*, that a punitive damages award "may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris v. Kelco Disposal, supra*, 106 L.Ed.2d 219, 239. Two of the Justices wrote separately to underscore that *Browning-Ferris* "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 106 L.Ed.2d at 241 (Brennan, J., concurring).

The door is thus open for such a ruling, and this record cries out for one. It would also be a modest ruling in one sense, because the due process violations were extreme.

Assuming *arguendo* that due process is applicable, is it satisfied in punitive damages cases simply by intoning the usual jury instructions on the relevant considerations? Two months earlier, the same Court of Appeal had “declined[d] the invitation to be the first court in this state to rule that such instructions do not afford due process.” *People Ex. Rel. Dept. of Transportation v. Grocers Wholesale Co.* (Sept. 29, 1989) 214 Cal.App.3d 498, 514. This Court should do so now, to this extent: It should rule squarely that established due process principles *do* apply in punitive damages cases; *do* require the basic procedural protections of fair notice and a fair opportunity to defend; and are *not* always satisfied by a mere recital of the usual jury instructions.

Indeed, the usual instructions tell the jury “to consider the reprehensibility of the conduct. . . .” *Grocers Wholesale, supra*, 214 Cal.App.3d at 514. Due process was hardly satisfied by giving such an instruction in the instant case, because the whole reprehensibility issue had been grotesquely distorted at the trial.

With the power of selective review, this Court can reach directly to the crux of this case. The petitioners invite that limitation of the review. *See generally, DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, and *see* fn. 2 at 520. Although the records and briefs below are voluminous, the issues presented in this petition can be adjudicated without poring through all that material. The nature and impact of the twin due process violations herein are apparent virtually on the face of the opinion below.

IV.

PREVIEWING THE MERITS

This petition will now conclude with a very brief introduction to the two due process issues presented.

A. The Right to Notice

Not surprisingly, it was a criminal proceeding that prompted this Court most recently to invoke the due process

right to notice, there, the right to "fair [written] notice of the nature of the penalties and proceedings he faces. . . ." *Mitchell v. Superior Court*, *supra*, 90 C.D.O.S. 39, 44. Just the same, the due process guarantee has been deemed to apply to inflictions of "grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction. . . ." *Matthews v. Eldridge* (1976) 424 U.S. 319, 333. *Accord*, *Jones v. State Bar* (1989) 49 Cal.3d 273, 288.

In the instant "civil" case, therefore, a serious question arises about the lack of any formal specification of the "eleven years" of conduct for which Mr. Hasso was punished. Long before *Mitchell*, this Court wrote in a civil case that "the essence of the matter is fairness in pleading to give the defendant such notice by the complaint that he may prepare his case." *Leet v. Union Pac. R. Co.* (1944) 25 Cal.2d 605, 619.

Fraud itself must be pleaded with particularity. Yet the \$2,000,000 fraud punishment in the instant case was inflicted at trial, and then affirmed on appeal, without the slightest discipline of a particularized statement. The trial roamed freely across the plaintiff's wide landscape of accusations. In a recent rejection of a due process challenge in this area, a Court of Appeal *assumed* that "the conduct which warrants such an award is defined in careful detail." *Radell v. Comora* (1989) 211 Cal.App.3d 1244, 1259. It certainly should be, but here it manifestly was not.

Most likely, the discipline and notice of a pleading would also have averted the spectacle of Mr. Hasso's trial on charges of defending himself in this very action. Hasso has cited in vain to such cases as *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, for the proposition that acts in defense of the litigation cannot be turned around as the substantive basis for punishment. Reason would surely have prevailed in this case long before now had respondent ever attempted to reduce his "eleven years of fraud" to a pleading.

In sum, the basic notice requirement of due process may well have averted the mockery of a trial below.

B. The Right to a Meaningful Opportunity to Defend

Once the trial began, however, another due process right came into play: the right to defend. "The hearing required by the Due Process Clause must be 'meaningful' . . . and 'appropriate to the nature of the case.'" *Bell v. Burson* (1971) 402 U.S. 535, 542-542. *Accord, Rios v. Cozens, supra*, 7 Cal.3d 792.

Bell and *Rios* both involved the suspension of a driver's license. That significant a deprivation, it was held, required a meaningful opportunity to defend against an administrative finding of probable liability for causing an accident. The pertinent statutes having made such liability "an important factor" in the scheme, 402 U.S. at 541, the administrative hearing *had* to give the affected party an opportunity to defend on that issue:

[A] hearing which excludes consideration of an element essential to the decision . . . does not meet this [due process] standard. (402 U.S. at 542)

This Court should now hold squarely that, for due process purposes, the reprehensibility of the conduct in question is "an element essential to the decision" in a punitive damages case. That element may simply not be pretermitted from a punishment trial. "[T]he function of punitive damages is not served by an award which, in light of the defendant's wealth *and the gravity of the particular act*, exceeds the level necessary to properly punish and deter." *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (emphasis added).

In *Hale v. Morgan, supra*, 22 Cal.3d 388, this Court significantly limited a civil penalty statute on due process grounds because, among other things, it omitted any of the "moderating influences" found in comparable statutes. It excluded any consideration of "ameliorating factors" or the "degree of culpability." 22 Cal.3d at 399. Compounding that problem, too, was the "potential limitless" penalty which was possible under the statute. *Id.* at 404. This Court concluded by giving the statute a limiting construction to avoid "constitutionally excessive penalties." *Id.*

So here. The time is ripe and the record is presented for a modest holding indeed, that this basic due process protection does apply in punitive damages cases. Civil defendants, no more than criminal ones, must not be exposed to substantial punishment without a meaningful opportunity to defend themselves.

V.

CONCLUSION

A review is compelled in this case for all the reasons stated. We urge that it be granted.

Dated: January 9, 1990

BRONSON, BRONSON & McKINNON

By /s/ ELLIOT L. BIEN
ELLIOT L. BIEN
Attorneys for Defendants and
Appellants, JOHN HASSO *et al.*

APPENDIX L

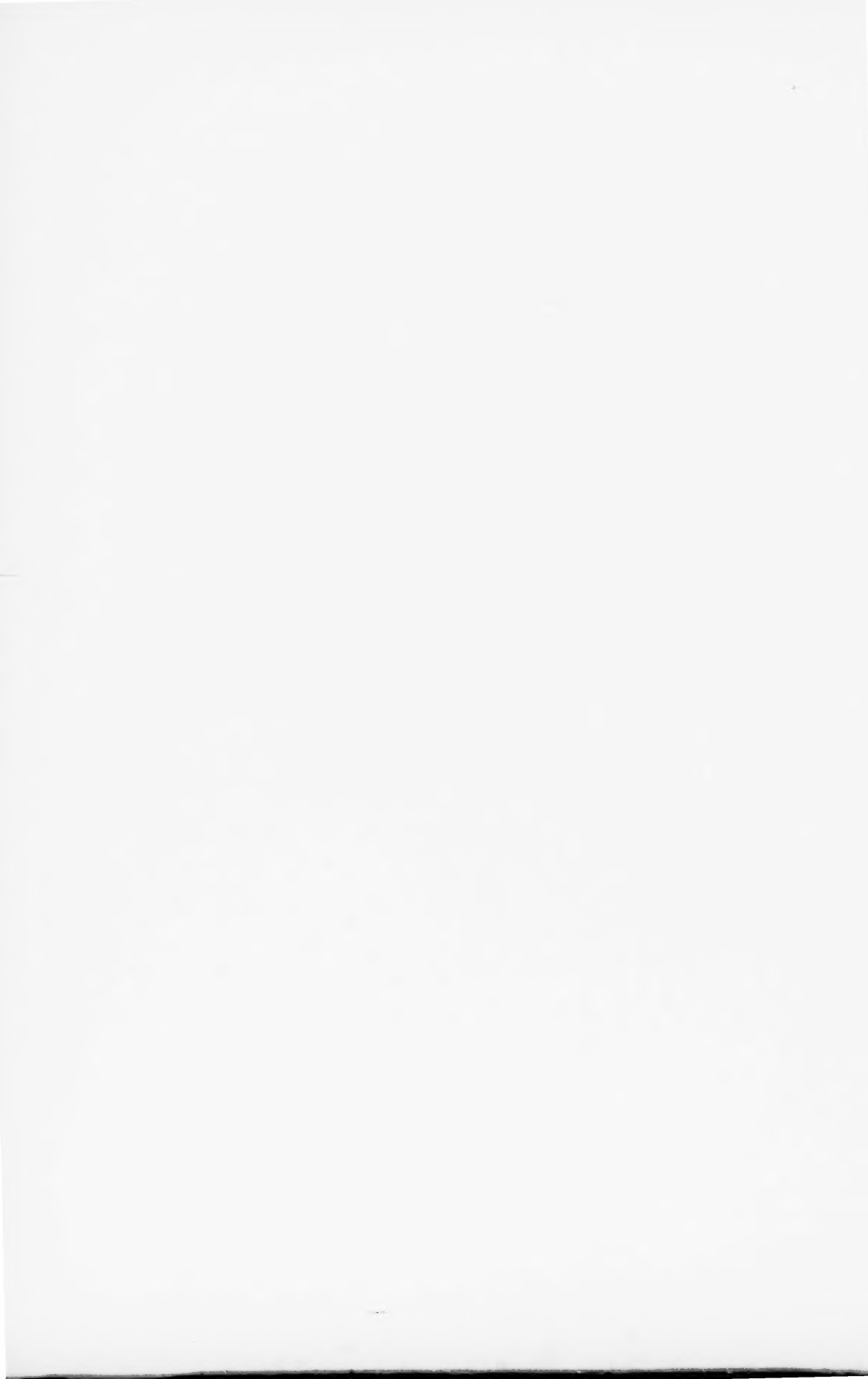
THE PROFIT ON PROFIT FROM THE FRAUD

| <u>PROPERTY</u> | <u>DATE OF SALE¹</u> | <u>PROFIT AT TIME OF SALE²</u> | <u>PROFIT ON PROFIT³</u> |
|--|--|---|---|
| NOONAN WINERY .. | March 4, 1981 | \$1,467,464 | \$1,392,183 |
| PLATEAU RANCH.... | May 31, 1984– December 15, 1987 (9 lots) | \$ 477,602 | \$ 100,296 |
| WATTS (ACB) | June 12, 1981 (5 acres); November 19, 1984 (234 acres) | \$ 969,438 | \$ 320,884 |
| VALLEY VIEW | April 29, 1983 | \$ 77,418 | \$ 47,264 |
| TAHOE CONDO (#89)..... | January 2, 1981 | \$ 18,312 | \$ 17,373 |
| TAHOE CONDO (#92)..... | November 4, 1980 | \$ 26,597 | \$ 25,233 |
| MAIN STREET..... | November 19, 1984 | \$ 230,698 | \$ 76,361 |
| TRANCAS..... | August 8, 1980 (35%); January 20, 1984 (50%) | \$ 99,755 | \$ 74,208 |
| THE "PROFIT ON PROFIT" AT TIME OF 1988 TRIAL: | | | <u><u>\$ 2,053,802</u></u> |

¹ Attachment to Statement of Facts. (CT 898)

² The amounts shown reflect the "true profit" generated from sale of the subject properties and have been computed using the formula agreed upon by the parties [i.e., Sales Price – (Purchase Price + Expenses) = Profit]. (Trial Exhibits 14, 15, and 16)

³ The amount of profit from the date of sale was brought forward to the 1988 Trial using a ten percent (10%) annually compounded interest factor.



APPENDIX M

FILED SEPT - 7 1982

FLORENCE W. CUNNY, CLERK

BY /s/

DEPUTY CLERK

HERBERT W. WALKER, ESQ.
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A Professional Law Corporation
809 Coombs Street
Napa, California 94559
Telephone: (707) 252-7122
Attorney for Defendants

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NAPA

CHARLES A. DUGGAN,

Plaintiff,

vs

JOHN HASSO, *et al.*,

Defendants.

No. 39856

DECLARATION OF
JOHN HASSO
IN SUPPORT OF
MOTION FOR STAY
OF EXECUTION

AND RELATED CROSS-ACTION

I, JOHN HASSO, declare and state:

I am one of the Judgment Debtors herein; all of the matters stated are within my own personal knowledge except as to those stated to be upon information and belief and as to those I am informed and believe them to be true. If called as a witness I could competently testify to each and every fact set forth herein.

All of the material assets owned by myself and the other Judgment Debtors (ELISSA, N.V., PACIFIC MIDLAND,

N.V., and RUMBA, N.V.) consist of unimproved real property. These real properties are located principally in Napa and San Bernardino Counties, California and consist of fourteen different parcels of land having an aggregate fair market value as of September 1, 1982, in the sum of \$6,812,925.00. I have attached hereto as Exhibit "1" a schedule of all of these real properties identifying them by property description and separately stating the fair market value for each parcel.

The fair market value of the properties located in Napa County, California, as stated in Exhibit "1" are based upon the testimony of Mr. DEAN STAHR (Plaintiff's expert witness) during the trial of this action which values were accepted by the Jury and were the basis for their verdict.

Ten of these parcels have existing liens upon them (evidenced by promissory notes secured by deeds of trust thereon) having an aggregate total liability of \$1,395,811.13. The amount of the individual existing liens as to each parcel of real property is set forth on Exhibit "1" hereto.

The equity or net value of all of the real property assets owned by myself and the other Judgment Debtors totals \$5,417,113.87 (an amount far in excess of that required to satisfy the judgment recorded herein).

All of the real property assets of myself and the other Judgment Debtors are unimproved real property from which *no income is derived*. To the contrary, these properties require the constant outlay of cash for real property taxes, debt service, and miscellaneous charges.

Neither myself nor the other Judgment Debtors have any employment or other source of income for the purpose of making these payments. It was my initial intent and plan to develop and sell the real properties as identified in Exhibit "1" for the purpose of maintaining a cash flow to pay the debt initially incurred in their purchase and for their development.

Because of the *lis pendens* that was recorded by the plaintiff herein at the outset of this action and the Abstracts of Judgment recorded in both Napa and San Bernardino Counties following entry of the Judgment, my hands have

been effectively tied as I have not been able to generate sufficient cash by way of sale or development of these properties for the purpose of continuing to service the debt incident thereto.

At the present time, installments on the notes secured by deeds of trust on the various parcels of real property are either due or will shortly become due. The dates to which these notes have been paid or on which installments will become due is set forth in Exhibit "1" attached hereto.

As of September 1, 1982, there is currently owing \$195,086.39 against the various notes. The individual amounts due attributable to each parcel of real property is set forth in Exhibit "1" hereto.

I am unable to raise sufficient funds to pay these notes and many are presently delinquent as reflected by Exhibit "1". In addition, two of the properties (Redlands Blvd.—San Bernardino and Highland—San Bernardino) are in default with Notices of Default and Intent to Sell having been recorded.

During the pendency of the action herein, the court (on Stipulation of the parties) allowed the sales of various parcels of property on the condition that a percentage of the net proceeds be set aside in trust accounts as security for the payment of a judgment that might be rendered.

As of the present time there is \$115,344.91 cash on deposit in these trust accounts.

I am willing at the present time to transfer properties with a market value in excess of \$2,000,000.00 as security for the payment of the judgment herein (in the event that judgment is affirmed on appeal) for the purpose of obtaining an order staying execution by this Court, which together with the \$115,344.91 cash would be more than adequate security in satisfaction of the Judgment.

I am willing to transfer (in some form to be held as security) the properties identified as Plateau Ranch—Angwin (net value \$882,900), St. Helena Gates—St. Helena (net value

\$490,500). Cold Springs—Angwin (net value \$386,360.32) and Trancas Avenue—Napa (net value \$313,375) for a total of \$2,073,135.32.

Unless this Court stays execution on appeal (by the acceptance of the above real properties and cash currently held in trust accounts) the decision of the Appellate Court may be rendered moot. It is my anticipation that Plaintiff will (if he hasn't already done so) immediately seek the issuance of Writ of Execution, levy upon the real properties which have been liened by Abstracts of Judgment and virtually strip the Judgment Debtors of all of their assets.

In mid-April, 1982, I conferred with my attorney, Mr. HERBERT W. WALKER of DICKENSON, PEATMAN & FOGARTY, and reviewed with him the steps that would necessarily have to be taken in order to stay execution on appeal in the event I was unsuccessful with respect to various post-trial motions. In mid-April of 1982 (based upon the advice of counsel) I spoke to Mr. DON ROCKWELL of Angwin, California, who has acted as my insurance broker for several years. I conveyed to him the information given to me by my attorney and requested that he pursue the obtaining of a commitment for the issuance of the bond to stay execution on appeal on behalf of the Judgment Debtors.

I am informed and believe that thereafter Mr. ROCKWELL spoke to Mr. RUSS BARKER (of BARKER, SEMINARA & HOLMAN, insurance brokers, Napa, California) for the purpose of obtaining a corporate surety bond for the purpose of staying execution on appeal.

On May 4 and 5, 1982, I spoke to my attorney and reviewed the requirements for applying for a bond including the supplying of a complete financial statement on behalf of the Judgment Debtors. Thereafter I received my attorney's letter of May 6, 1982, advising me as to the status of obtaining the bonds and requesting that I forward personal financial statements to the brokers for the purpose of their pursuing the application for a stay bond.

During the latter part of May, 1982, I was advised by Mr. ROCKWELL that the various bonding companies (over

twenty of which had been approached by Mr. ROCKWELL, Mr. BARKER and Mr. ASHER) were not able to commit to the issuance of a bond based upon my financial statement since they would require full cash collateral in the face amount of the bond (that is \$2,500,000.00 in cash).

Since neither myself nor the other Judgment Debtors have the cash and we are unable to sell or borrow against our real property assets (due to the Lis Pendens recorded by Plaintiff), it became apparent that the obtaining of a bond necessary for the issuance of a stay of execution of appeal would be impossible.

In early June I contacted Mr. MIKE MANN who had been represented to me to be an expert in obtaining bonds and delivered my financial statement for him to pursue the obtaining of a stay bond on my behalf. Thereafter, in approximately mid-June, 1982, I was advised by Mr. MANN that no corporate surety would issue a stay bond without the posting of full cash collateral in the face amount of the bond.

At that time it became apparent that I would be unable to obtain a corporate surety bond and I immediately commenced inquiry of various relatives and friends for the purpose of obtaining individual sureties.

Throughout the latter part of June and during the months of July and August, 1982, I spoke to several relatives, friends and acquaintances, who I knew had substantial net worth for the purpose of obtaining their individual surety agreements to be filed with the Court. During the period I spoke to DANIEL HASSO (my first cousin), ALLEN HASSO (my nephew), DR. ROBERT JOHNSON and CARL YARED (close friends) and YAKOB NASHED (a relative), and requested that they consider the execution of a personal or individual surety bonds to be filed with the court in the requisite amount.

All of these individuals advised me that, while they were sympathetic to my position, they were unwilling to execute a bond or surety agreement in the sum required to obtain a stay of execution relative to the Judgment that had been previously entered.

I have exhausted all possibilities of obtaining either a corporate surety bond or individual sureties upon which the trial court could issue its stay of execution.

The only alternative open at this point, to avoid financial ruin to myself, the other corporate Defendants and my family, is to have the Court stay execution upon the transfer of real properties (as security) with a net value sufficient to satisfy the Judgment in the event it is affirmed on appeal.

I declare under penalty of perjury that the foregoing is true and correct this 2nd day of September, 1982, at Napa, California.

/s/

JOHN HASSO

[Trial Exhibit 1]

APPENDIX N

EXCERPT FROM ORDER AND FINDINGS OF FACT OF U.S. BANKRUPTCY COURT

"8. There is also a property in Napa called the ACB Watts Property which defendants' appraiser testified had a value of \$1,302,550. Mrs. Hasso, wife of debtor, John Hasso, has encumbered this property by a deed of trust in her favor recorded on January 19, 1982. Her testimony was that she was owed in excess of \$1,500,000 which was secured by this property.

*

*

*

11. The court takes judicial notice of the ruling on the motion for new trial or for judgment notwithstanding verdict in the lawsuit entitled *Duggan v. Hasso*, No. 39856, Superior Court of Napa County, California. In the same proceeding, the court takes judicial notice of the Order Denying Stay of Execution, the court also has considered the declarations of Mr. Hasso filed in both in the Superior Court and in the California Court of Appeals seeking a stay.

*

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12. *The declaration of Debtor Hasso referred to in paragraph 11 contains various misstatements of fact with respect to properties owned by the debtors and the equity available for the judgment creditor Duggan.*

*

*

*

DATED: January 17, 1983

/s/

CONLEY S. BROWN
UNITED STATES
BANKRUPTCY JUDGE

[Trial Exhibit 2]



APPENDIX O

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S COMMENTS AS TO THE HASSO FAMILY "CONSPIRACY" [RT 1357:19 - 1361:10]

MR. JACOBSON: Your Honor, the evidence is—has been compelling so far of—of an extraordinarily unusual relationship between John Hasso, Alan Hasso, and Hebe Hasso, and the way they have dealt with marital property.

THE COURT: Well, and dusty—

MR. JACOBSON: Augusta Maidani.

THE COURT: *The whole thing is, it seems to me a—strongly suggest a familiar—well, for lack of a better word, conspiracy.*

MR. JACOBSON: Yes. And that's precisely my point of view. And I'm going to have more evidence in the case on that very point, and I intend to go to the jury with that very point with regard to the important issue of Mr. Hasso's financial condition for purpose of punitive damages.

But I think that he has not talked with her in 12 or 18 months has little or no probative value on this question of whether there is something strange and unusual going on, and whether this—this attempt to block her deposition testimony is in furtherance of that—of that purpose from Mr. Gulick to say I have no control over her.

She is not a party, and I don't represent he—her. And then to vigorously and forthrightly oppose her deposition on the ground having nothing to do with the form of the notice.

This isn't an objection to form. It's a statement that she is not here and you can't take her deposition. That's the message that I was given.

THE COURT: Yeah, I agree. I think it's—its exactly what you characterize it to be, and I'm going to permit you to introduce this as an authorized admission to—against interest exception to the hearsay rule.

MR. JACOBSON: Thank you, your Honor. And then may I address one more matter before the jury comes in?

What I mentioned yesterday afternoon, and I'm not describing either Mr. Gulick or myself, because we are all human, but may I invite the Court to once again tell the jury—

THE COURT: Well, I will mention—

MR. JACOBSON:—that on objections—and would your Honor be kind enough to supplement your comments by saying that there is an important purpose served by the objections having to do with the reliability and clarity of the evidence that they are given to consider in the case. Because I suspect some of them—the jury don't even understand why objections are being made. We lawyers use technical terms.

THE COURT: I'll try to do that, Mr. Jacobson.

MR. JACOBSON: Thank you, your Honor.

MR. HASSO: And would I be allowed to make a comment or comments you made just a few seconds ago?

THE COURT: I'd rather you only respond to the questions that are asked by counsel.

MR. HASSO: Fine.

THE COURT: Mr. Hasso, just for the record, I'm still—and I note Miss Hasso is present, and she wasn't present earlier, and may be puzzled by my remark about a conspiracy.

The thing—the things that I'm relying on to make that remark are the contention that was made to me last year that the two and a half million dollars belonged to Mrs. Maidani.

The suggestion that—that no continuance should be granted Mr. Jacobson to respond to her motion because she had made a special trip here from Lebanon to be present when the motion was heard, and presumably take the money, if her motion was granted.

And now, my discovery is that, in fact, the money is not hers and never has been hers. She was simply a conduit.

And it was placed in agreement—was placed in her name for reasons that I don't fully value when, in fact, Mr. Hasso was the owner and had control of that money.

Plus the fact that apparently the—there was an issue now pending as to whether anyone has been paying income taxes on the interest. We don't know, really, to whom the money has been going. It's been paid to a bank officer in Southern California.

Franchise tax board has notified the county clerk that nobody has been paying any income taxes on it. County counsel's office has now filed a motion for instructions set for April 19th, to try to sort out what's happened.

Plus this other factor that I've alluded to where it appears that Mr. Hasso, while under the threat of this case, transferred most of his assets and value to his former spouse, keeping only assets without value. All of which seems to me to suggest some misappropriation going on here between various family members.

Plus this new disclosure that what was an unconditional conveyance of the Watts Property of Alan Hasso is not, in fact, unconditional. And there is some sort of an unwritten, perhaps even unarticulated, moral commitment felt by Alan Hasso to reconvey the property to Hebe Hasso and possibly even John Hasso in exchange, I guess, for payment of the moneys that he loaned.

All of which indicates to me that this is a very close family who circled the wagons apparently when under attack. And that's what I meant when I remembered—

MR. HASSO: Your Honor, it's very simple.

THE COURT: I wasn't implying any criminal criminality. I just think that there is a civil—there seems to be a strong suggestion here a civil pact among them to protect the family's wealth when it's assaulted.

I'm sorry. That's for the record. I don't want to argue about it. That's just my reaction to what I heard in this case so far, and I'm particularly annoyed by Mrs. Maidani's

representations through counsel that that two and a half million dollars was hers and that was apparently the only security that was clearly available for the plaintiff if he prevails or when he prevails in this case.

That money, had I succumbed to her assertions and released it to her, I'm certain would be long gone by now. It would be back in Lebanon. And there would be absolutely no security. The lien on Mr. Jacobson's less pendens that he released and reliance on that bond money being placed would be gone. The judgment lien would be gone.

There being no money judgment by view of the reversal of the court of appeals, and I think Ms. Maidani came very close to perpetrating what was amounted to a fraud in this court.

And I think by implication, John Hasso must have been a party to that because he stood by and allowed her to come into court through counsel and to represent to me that she was the owner of that money, when his testimony in this proceeding has clearly indicated he was the owner of it.

So, that's the basis of my ruling. I'm going to allow 10 into evidence for what limited evidentiary effect it may have. (Emphasis added)

[RT 1357:19 - 1361:10]

APPENDIX P

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, TRIAL JUDGE'S RULING THAT BOTH PARTIES ARE PRECLUDED FROM INTRODUCING EVIDENCE ON THE BASIC FRAUD [RT 987:17 - 988:27]

THE COURT: Bear in mind, gentlemen, I'm ruling intuitively. I've heard no law on this except for one citation, which didn't sound to me to be really on point. If either of you can be—it's a little late in the game, in middle of opening statements, but I don't like ruling intuitively in a case of this magnitude. I don't see how else we can. What other ground rules we can adopt that don't result in reopening the first trial.

And then I haven't said it, but I think 352 does come into play here. A., I don't think that this is relevant to the issue before us, but even if there is some slight or marginal relevance we get into another four to six weeks of trying the case essentially because we're going to be retrying the first trial. It would seem to me terribly confusing to the jury. It would be confusing enough to me to tell them on the one had there is a fraud determination, then to present them with a whole lot of evidence on—generally from which it will be argued, well, it was just a little fraud. It wasn't a big fraud. It was a mistake. It wasn't a fraud at all. It was based Mr. Hasso's reliance on Mr. Humphreys. And he really thought he was acting properly in doing so. So maybe that really there wasn't any fraud at all. I don't see where else that line of reasoning is going to go.

So I think it's irrelevant. I think it's barred by the law of the case res judicata. And I think that 352 does come into play, if it's even slightly relevant. And I think the trick is going to be trying to keep the two of you on some kind of an even keel so that Mr. Jacobson can't go back and dredge up things that—to increase the reprehensibility. That, frankly, what sounds like his theory of the case is that there's been a

lot of conduct since the judgment from which it could be argued that there has been a compounding of the original reprehensibility. I don't think he needs to go back. If the jury finds that all of these machinations and so forth have occurred and feels that it was done simply to compound the original secret intent to defraud Mr. Duggan of his profit, I think he's got plenty to argue. (Emphasis added)

[RT 987:17 - 988:27]

APPENDIX Q

EXCERPT FROM OFFICIAL REPORTER'S TRANSCRIPT, REFUSAL OF TRIAL JUDGE TO RULE *IN LIMINE* ON ADMISSIBILITY OF SO-CALLED MITIGATING EVIDENCE [RT 855:21 - 856:21]

THE COURT: I just—I think we're frankly reaching a point of diminishing returns. We can argue this generally forever. Until there are specific issues before me I'm just not in a position I don't think to rule.

And I may make the case more cumbersome. It may necessitate interrupting and sending the jury out and so forth so that I can hear argument and sobeit. I hope we don't have to do too much of that because it's awkward for everybody, and I'll do what I can to try to minimize it.

Maybe when I get into a specific area I can focus on the specifics and give you a ruling, then that will, you know, give you some guidance for at least the next several questions, if not so we don't have to do it just on a question by question basis.

But the only givens here are those that are set forth in the statement of facts that I read to the jury. How we're going to wrestle with that and what efforts Mr. Hasso is going to make to present himself in a better light this time than he did the last time, I don't know and I'm not sure you know. You may have your suspicions and want me to rule in limine that he can't do it, but I don't think I can make that kind of in limine motion.

MR. JACOBSON: I accept your Honor's statement.

THE COURT: I agree with you any effort to get on the stand now and to relitigate the issue of fraud I would probably sustain an objection. What efforts he's going to make to present himself, however, in a better light given that adverse determination I don't know. I can't predict him and I'm unwilling to rule in advance of them.

[RT 855:21 - 856:21]



APPENDIX R

COURT OF APPEAL OPINION SIGNATURE PAGE

Perley, J.

We concur:

Anderson, P.J.

Channell, J.